THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1994 CUMULATIVE SUPPLEMENT

Volume 7

Chapters 28 through 41

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 443 S.E.2d 468. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia
1994

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Preface

This Cumulative Supplement to Volume 7 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 28 through 41 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 336, p. 77.
North Carolina Court of Appeals Reports through Volume 114, p. 505.
South Eastern Reporter 2nd Series through Volume 443, p. 468.
Federal Reporter 3rd Series through Volume 21, p. 1127.
Federal Supplement through Volume 848, p. 212.
Federal Rules Decisions through Volume 154, p. 535.
Bankruptcy Reports through Volume 166, p. 498.
Supreme Court Reporter through Volume 114, p. 1877.
North Carolina Law Review through Volume 72, p. 1128.
Wake Forest Law Review through Volume 29, p. 646.
Campbell Law Review through Volume 16, p. 145.
Duke Law Journal through Volume 43, p. 1348.
North Carolina Central Law Journal through Volume 20, p. 229.
Opinions of the Attorney General.

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ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Jurisdiction Exclusive. — Although § 7A-241 provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," this section specifies that the clerk is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Exclusive Jurisdiction to Appoint Administrators Lies with Clerk of Superior Court. — A superior court judge lacks jurisdiction to appoint an administrator, because the original and exclusive jurisdiction to appoint administrators lies with the clerk of superior court. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Derivative Jurisdiction of Judge. — In most instances the superior court judge's probate jurisdiction is, in effect, that of an appellate court, because his jurisdiction is derivative and not concurrent. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Procedure on Appeal from Order of Clerk. — In an appeal from an order of the clerk in a probate matter, the superior court is not required to conduct a de novo hearing. Rather, when a finding of fact by the clerk of court is properly challenged by specific exception, the superior court judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury, which course he could not follow without hearing evidence. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Action for Breach of Duties, Negligence, and Fraud in Administration of Estate. — In accord with original. See Ingle v. Allen, 69 N.C. App. 192, 317 S.E.2d 1, cert. denied, 311 N.C. 757, 321 S.E.2d 135 (1984).

Cited in In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); In re Estate of Wright, 114 N.C. App. 659, 442 S.E.2d 540 (1994).

§ 28A-2-3. Jurisdiction where clerk interested.

CASE NOTES

Applied in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

ARTICLE 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-1. Proper county.

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

(1) In the county in this State where the decedent had his domicile at the time of his death; or

(2) If the decedent had no domicile in this State at the time of death, then in any county wherein the decedent left any property or assets or into which any property or assets belonging to this estate may have come. If there be more than one such county, that county in which proceedings are first commenced shall have priority of venue; or

(3) If the decedent was a nonresident motorist who died in the State, then in any county in the State. (R.C., c. 46, s. 1; C.C.P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C.S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765; 1973, c. 1329, s. 3.)

Editor's Note. — Subdivision (1) of this section is set out above to correct a typographical error in the main volume.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Venue of a proceeding in the nature of a creditor's supplemental proceeding under § 1-307, in which in order to issue an execution on defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by § 1-307, and not by this section. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

(a) Letters Testamentary. — Letters testamentary shall be granted to the executor or executors named or designated in the will, or if no such person qualifies, to any substitute or successor executor named or designated in the will. If no person so named or designated qualifies, letters testamentary shall be granted to some other person nominated by a person upon whom the will expressly confers the authority to make such nomination. If none of the foregoing persons qualifies or if the clerk of superior court upon hearing finds that none of the foregoing persons is qualified in accordance with G.S. 28A-4-2, the clerk shall grant letters of administration in accordance with subsection (b).

(b) Letters of Administration. — Letters of administration shall be granted to persons who are qualified to serve, in the following order, unless the clerk of superior court in his discretion determines that the best interests of the estate otherwise require:

(1) The surviving spouse of the decedent;
(2) Any devisee of the testator;
(3) Any heir of the decedent;
(3a) Any next of kin, with a person who is of a closer kinship as computed pursuant to G.S. 104A-1 having priority;
(4) Any creditor to whom the decedent became obligated prior to his death;
(5) Any person of good character residing in the county who applies therefor; and
(6) Any other person of good character not disqualified under G.S. 28A-4-2.

When applicants are equally entitled, letters shall be granted to the applicant who, in the judgment of the clerk of superior court, is most likely to administer the estate advantageously, or they may be granted to any two or more of such applicants. (R.C., c. 46, ss. 2, 3; C.C.P., s. 456; 1968-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C.S., s. 6; 1949, c. 22; 1973, c. 1329, s. 3; 1987, c. 357.)

CASE NOTES

III. Letters of Administration.

III. LETTERS OF ADMINISTRATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under subdivision (4) of this section because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

Applied in Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-2. Letters issued without notice; exceptions.

CASE NOTES

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. General Consideration.
III. Default or Misconduct.

I. GENERAL CONSIDERATION.

Section 1A-1, Rule 58 Inapplicable to Denial of Motion to Revoke. — Section 1A-1, Rule 58 has no application in case involving the denial of a motion made before the clerk of superior court pursuant to this section to revoke the letters testamentary of executor. In re

Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Proceeding to remove an executor and a civil suit for damages are not the same cause of action. The proceeding to remove an executor is purely statutory, with probate jurisdiction vested in the clerk of superior court, and reviewable by a superior court judge on appeal. A civil suit for damages involves a full trial with the right to have factual issues resolved by a jury. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Statutory action to remove administrators or executors is not res judicata in any other proceeding which the parties are entitled to pursue. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

A proceeding under this section is not res judicata in a civil action for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Orders entered in a proceeding under this section, in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Beneficiaries Seeking Removal Not Held to Election of Remedies. — Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Denial of Motion to Revoke "Entered" When Clerk Announced After Hearing He Would Deny It. — Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing that he would deny the petition. The party aggrieved by the ruling, the petitioner, was present and even excepted to the order, had ten days thereafter to give notice of appeal pursuant to § 1-272. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Verification Sufficient. — Signing of petition for revocation before a notary public under oath, petitioner having sworn that the matters stated in the petition upon her information and belief were true, constituted sufficient verification required by this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

"Special Proceeding." — The procedure for the revocation of the letters testamentary of an administratrix as set forth in this section is a "special proceeding," and the clerk had statutory authority to appoint the guardian ad litem. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

The minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under this section to appeal the decision of the clerk on the revocation issue. This was sufficient to bring the matter within the purview of Rule 17 providing it was an "action or special proceeding." In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Quoted in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

III. DEFAULT OR MISCONDUCT.

Executor's acceptance of commissions based on an erroneous interpretation of a statute would not be misconduct requiring revocation of letters testamentary. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Allegations of Misconduct Held Sufficient. — Allegations that coexecutor failed to timely file estate accountings with the clerk's office, disregarding notices issued by the clerk that such accountings were due, that he paid himself approximately $32,900 from the estate for his commission and attorneys' fees without approval of the clerk and that this amount was in excess of any amount which he could legally be allowed for commissions and legal fees, and that through his default and misconduct he had violated his fiduciary duty as a coexecutor of the estate constituted sufficient grounds upon which executrix could petition for the revocation of coexecutor's letters under subdivision (a)(3) of this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

ARTICLE 11.

Collectors.

§ 28A-11-3. Duties and powers of collectors.

CASE NOTES

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-1. Time of accrual of duties and powers.

CASE NOTES

Testamentary directions for disposition of the testator's body must be treated as valid upon the death of the testator, and funeral directors who act upon the provision in good faith cannot later be held liable in tort because they acted before the will was probated. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

A testamentary provision directing disposition of the testator's body must prevail over conflicting wishes of the testator's next-of-kin and the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and therefore they have no standing to sue for negligence for failure to carry out their instructions for disposal of testator's body. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

Cited in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or

devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36A-63.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy, and to execute waivers, consents or objections with respect to such stock or securities.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102(3).

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continua-

tion is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not, provided that any such settlement shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(a1) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a1) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

(1) A description of the real property which is the subject of the petition;

(2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;

(3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an order authorizing that power. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C.S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3; 1985, c. 689, s. 8; 1991, c. 460, s. 3.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 36A-63" for "G.S. 36-27" at the end of subdivision (a)(5).

The 1991 amendment, effective October 1, 1991, in subdivision (a)(8) added "and to execute waivers, consents or objections with respect to such stock or securities."

CASE NOTES

Prior Settlement and Approval of Attorneys' Fees Not Bar to Malpractice Suit. — Settlement and approval of attorneys' fees in previous wrongful death action was not a bar to suit for attorney malpractice alleging negligence and breach of fiduciary duty; collateral estoppel was not applicable so as to support summary judgment in favor of defendants. Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990).

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

Cited in Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990); Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990); Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

(a) As used in this section, the term "personal representatives" includes testamentary trustees.

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

(1) Open bank accounts and draw checks thereon;
(2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
(3) Employ attorneys and accountants;
(4) List property for taxes and prepare and file State, municipal and county tax returns;
(5) Collect claims and debts due the estate and give receipts therefor;
(6) Pay claims against and debts of the estate;
(7) Compromise claims in favor of or against the estate;
(8) Have custody of property of the estate.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;
(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
(3) If one or more vote, in person or by proxy, but the vote is evenly split on any particular matter, each fraction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which he joins at the direction of the majority of the personal representatives, if he expressed his dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1959, c. 1160; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1991, c. 460, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, substituted the current subsection (d) for one which read "The voting of corporate shares of stock is governed by the provisions of G.S. 55-69(f)."

§ 28A-13-10. Liability of personal representative.

CASE NOTES

Liability for Depreciation of Assets. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Article 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

(a) Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least three months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish or mail notice to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. When any collector or personal representative of an estate has published or mailed the notice provided for by this section, no further publication or mailing shall be required by any other collector or personal representative.

(b) Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 75 days after the granting of letters. Provided, however, no notice shall be required to be delivered or mailed with respect to any claim that is recognized as a valid claim by the personal representative or collector.

(c) The personal representative or collector may personally deliver or mail by first class mail a copy of the notice required by subsection (a) of this section to all creditors of the estate whose names and addresses can be ascertained with reasonable diligence. If the personal representative or collector in good faith believes that the notice required by subsection (b) of this section to a particular creditor is or may be required and gives notice based on that belief, the personal representative or collector is not liable to any person for giving the notice, whether or not the notice is actually required by subsection (b) of this section. If the personal representative or collector in good faith fails to give notice required by subsection (b) of this section, the personal representative or collector is not liable to any person for such failure. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C.S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 319; 1987 (Reg. Sess., 1988), c. 1077, s. 1; 1989, c. 378, s. 1; c. 770, s. 8; 1991, c. 282, s. 1.)

Effect of Amendments. — The 1985 amendment, effective June 4, 1985, and applicable to the administration of the estates of persons dying on or after that date, added the last sentence.

The 1987 (Reg. Sess., 1988) amendment, effective July 8, 1988, and applicable to decedents dying on or after April 19, 1988, rewrote the catchline, designated the first paragraph as subsection (a), in subsection (a) inserted "or mail" in the next-to-last sentence and inserted "or mailed" or "or mailing" in the last sentence, and added subsection (b).

Session Laws 1989, c. 378, s. 1, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, deleted "within 20 days" preceding "after the granting of letters" in the first sentence of subsection (a); in subsection (b), in the first sentence, substituted "Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail" for "Every personal representative and collector within 90 days after the granting of letters shall send by first class mail," and substituted "75 days after the granting of letters" for "the 90 days," and added the last sentence; and added subsection (c).

Session Laws 1989, c. 770, s. 8, effective August 12, 1989, substituted "at least" for "a least" in the first sentence of subsection (a).

The 1991 amendment, effective June 13, 1991, and applicable to the administration of the estates of decedents dying on or after January 1, 1992, substituted "three" for "six" in the first sentence of subsection (a).

Legal Periodicals. — For article, "Notice to Creditors in Estate Proceedings: What Process Is Due?", see 63 N.C.L. Rev. 659 (1985).

CASE NOTES

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-14-1.1. Validation of certain notices.

(a) Any notice to creditors published or posted under G.S. 28A-14-1 which did not, in the advertisement, name the day after which claims could not be presented is validated.

(b) This section applies to all notices published and posted between October 1, 1975, and January 1, 1991, except that it does not affect any pending litigation or any litigation instituted within 90 days of January 1, 1991. (1981, c. 96, ss. 1, 2; 1987, c. 277, s. 8; 1989, c. 390, s. 8; 1991, c. 489, s. 8.)

Editor's Note. — Session Laws 1987, c. 277, which amended this section, in s. 11 provided: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "March 16, 1987" for "March 16, 1981" in two places in subsection (b).

The 1989 amendment, effective June 21, 1989, substituted "March 16, 1989" for "March 16, 1987" in two places in subsection (b).

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "March 16, 1989" in two places in subsection (b).

§ 28A-14-2. Proof of notice.

A copy of the notice directed by G.S. 28A-14-1(a) to be posted or published, together with an affidavit or affidavits of one of the persons authorized by G.S. 1-600(a) to make affidavits to the effect that such notice was posted or published in accordance with G.S. 28A-14-1(a), and an affidavit of the personal representative or collector, or the attorney for the personal representative or collector, to the effect that a copy of the notice was personally delivered or mailed to each creditor entitled to notice in accordance with G.S. 28A-14-1(b) shall be filed in the office of the clerk of superior court by the personal representative or collector at the time the inventory required by G.S. 28A-20-1 is filed. The copy of the notice, together with the affidavit or affidavits, shall be deemed a record of the court and a copy thereof, duly certified by the clerk of superior court, shall be received as prima facie evidence of the fact of publication or mailing in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C.S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2; 1973, c. 1329, s. 3; 1987 (Reg. Sess., 1988), c. 1077, s. 2; 1989, c. 378, s. 2.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective July 8, 1988, and applicable to decedents dying on or after April 19, 1988, rewrote the catchline and the first sentence, and inserted "or mailing" in the second sentence.

The 1989 amendment, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, inserted "personally delivered" and "at the time the inventory required by G.S. 28A-20-1 is filed" in the first sentence.

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

(a) All of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property. Provided that before real property is selected the personal representative must determine that such selection is in the best interest of the administration of the estate.

(b) In determining what property of the estate shall be sold, leased, pledged, mortgaged or exchanged for the payment of the debts of the decedent and other claims against his estate, the personal representative shall select the assets which in his judgment are calculated to promote the best interests of the estate. In the selection of assets for this purpose, there shall be no necessary distinction between real and personal property, absent any contrary provision in the will.

(c) If it shall be determined by the personal representative that it is in the best interest of the administration of the estate to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court for such purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required for a sale made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.

(d) The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the personal representative or collector, as part of the personal assets of the decedent's estate; and shall not pass to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (1868-9, c. 113, ss. 14, 15; Code, ss. 1406, 1407; Rev., ss. 45, 47; C.S., ss. 52, 54; 1973, c. 1329, s. 3; 1975, c. 300, s. 5; 1985, c. 426.)

Effect of Amendments. — The 1985 amendment, effective June 19, 1985, added the last sentence of subsection (c).

CASE NOTES

Quoted in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

§ 28A-15-2. Title and possession of property.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Stated in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Bequest Not Adeemed by Sale During Testator's Incompetency. — Where the trial court found that testator specifically bequeathed his interest in livestock to his daughter, and subsequently became incompetent and did not regain his competency at any time before his death, and where his interest in livestock was sold by his trustees for $22,543.48, and those funds were included in the assets coming into the hands of the executor, and moreover, where there were sufficient assets in the estate to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises, these findings were sufficient to support the court's conclusion that testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by the trustee's sale thereof during testator's incompetency before his death. In re Estate of Warren, 81 N.C. App. 634, 344 S.E.2d 795 (1986).

§ 28A-15-10. Assets of decedent's estate for limited purposes.

CASE NOTES

Cited in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

§ 28A-15-12. Examination of persons or corporations believed to have possession of property of decedent.

CASE NOTES

Attorneys' fees were recoverable by administrators of decedent's estate, as successful parties, in suit by administrators to compel decedent's son to provide an accounting of certain estate property. In re Estate of Katsos, 84 N.C. App. 682, 353 S.E.2d 677, cert. denied, 320 N.C. 169, 358 S.E.2d 52 (1987).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

Article 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

I. General Consideration.
II. Practice and Procedure.

I. GENERAL CONSIDERATION.

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

II. PRACTICE AND PROCEDURE.

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

§ 28A-17-4. Heirs and devisees necessary parties.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.
II. Revival and Survival of Actions.

I. GENERAL CONSIDERATION.

This section clearly manifests, etc. —

In accord with the main volume. See Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Limitation for Wrongful Death Action Based on Medical Malpractice Not Extended by § 1-15(c). — Section 1-15(c) would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to § 1-53(4). King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812, cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

A viable fetus is a "person" under the Wrongful Death Act and the estate of such a person may bring an action for damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Applied in McGowen v. Rental Tool

Co., 109 N.C. App. 688, 428 S.E.2d 275 (1993).

Cited in Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

II. REVIVAL AND SURVIVAL OF ACTIONS.

Action for Divorce Did Not Survive Husband's Death. — Trial court did not err in dismissing husband's action for divorce and wife's counterclaim for equitable distribution where husband died before decree of absolute divorce was granted. Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271, cert. denied, 325 N.C. 270, 384 S.E.2d 513 (1989).

Action Under Tort Claims Act. — Recovery against the county board of education pursuant to the North Carolina Tort Claims Act did not bar plaintiff's claims against the individual bus driver who caused the wreck, or plaintiff's uninsured motorist/underinsured motorist (UM/UIM) carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act. Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars ($4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but

not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1. (R.C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C.S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468; 1985, c. 625; 1993, c. 299, s. 1.)

Effect of Amendments. — The 1985 amendment, effective July 5, 1985, inserted the present second and third sentences of subsection (a).

The 1993 amendment, effective October 1, 1993, and applicable to death occurring on or after that date, in the fourth sentence of subsection (a) substituted "four thousand five hundred dollars ($4,500)" for "one thousand five hundred dollars ($1,500)" following "expenses not exceeding" and substituted "death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered from deducting attorneys' fees. All" for "death; provided that all" following "incident to the injury resulting in."

Legal Periodicals. —

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For article, "Economic Valuation for Wrongful Death," see 6 Campbell L. Rev. 47 (1984).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For comment, "Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn," see 9 Campbell L. Rev. 93 (1986).

For note discussing the appointment of an administrator for a decedent's estate to create diversity of citizenship, see 21 Wake Forest L. Rev. 489 (1986).

For note discussing wrongful death recovery for a viable unborn fetus, in light of DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986), see 16 N.C. Cent. L.J. 207 (1987).

For note on the wrongful death of a viable fetus in North Carolina, see 66 N.C.L. Rev. 1291 (1988).

For note on the expansion of the viable fetus wrongful death action, see 11 Campbell L. Rev. 91 (1988).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

For note, "Examining DiDonato Damage Limitation and Mandatory Joinder Requirements — Greer v. Parsons," see 15 Campbell L. Rev. 97 (1992).

CASE NOTES

I. General Consideration.
III. Parties to the Action.
IV. Distribution of Recovery.
V. Damages Recoverable.
  A. In General.
  B. Pain and Suffering.
  C. Burial Expenses.
  D. Loss of Decedent's Income, Services, Society, etc.
  E. Punitive Damages.

I. GENERAL CONSIDERATION.

Editor's Note. *— Most of the cases below were decided prior to the 1993 amendment, which raised to $4,500 the limit on the amount recovered in a wrongful death action that is liable for the payment of hospital and medical expenses of the decedent.*

Annotations in the main volume under analysis line I, "General Consideration," and catchlined "Person in former § 28-173, etc." and "For case calling for legislative action, etc." should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

Preemption. — Where decedent was killed in automobile accident, Employee Retirement Income Security Act (ERISA) preempted the operation of North Carolina's wrongful death statute to the extent that the state law precluded operation of the terms of the "Acts of Third Parties" clause in the plan requiring reimbursement to plan. McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

Application of Section to Actions Pursuant to 42 U.S.C. § 1983. — There is no federal statutory law governing the measure of damages in wrongful death actions brought pursuant to 42 USC § 1983, and, therefore, 42 USC § 1988 compels the use of the law of North Carolina: namely, this section. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

The North Carolina wrongful death statute satisfies the two underlying policies of 42 U.S.C. § 1983, as it provides adequate relief for the estate of the deceased, and satisfies the policy of preventing abuses of power by state officials by the availability of punitive damages. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

Municipalities Not Exempt from Section. — The plain, positive provisions of this section contain no basis for supposing that the Legislature intended to exempt municipalities therefrom. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Section Encompasses Loss of Consortium Claims. — The trial court properly dismissed plaintiff's claim brought in her individual capacity for loss of consortium based on the ground that the wrongful death statute encompasses loss of consortium claims, and any common law claim encompassed by the wrongful death statute should have been asserted under this section by the personal representative for the deceased. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

The tort claim for "loss of consortium", no matter what damages may be recovered thereunder, is covered under the wrongful death statute, and plaintiff could not, therefore, bring an independent claim for loss of consortium in her action asserting a claim for wrongful death. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

Negligence Per Se. — Trial court did not err in admitting testimony that decedent did not have motorcycle endorsement at time of accident. Violation of § 20-7 is negligence per se. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Gross negligence is "something less than willful and wanton conduct," and includes "the absence of even slight care," "indifference to the rights and welfare of others," "negligence of an aggravated character." Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993).

Child Not a "Trespasser." — Child who was electrocuted when he entered power company's cabinet containing high voltage wires located on property on which the company had an easement, who had permission of the landowners to play on the property, was not a trespasser as that term has been defined by our case law, and thus the power company was not entitled to have its legal duty reduced. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Joinder of Action for Wrongful Death of Viable Fetus. — The action for wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Lack of Administrator for Fetus's Estate Not Grounds for Dismissal Where Clerk Unwilling to Issue Letters of Administration. — Cause of action for the wrongful death of the fetus was not subject to dismissal on grounds that it was not brought by the personal representative of the deceased as required by subsection (a), where the failure to bring this action in the name of the administrator of the estate was apparently due to the unwillingness of the clerk of court to issue letters of administration for a fetus's "estate." The existence of a cause of action for wrongful death is sufficient for the appointment of an administrator, and since a wrongful death action exists for a viable fetus, the clerk should have appointed an administrator to bring the action. Ledford v. Martin, 87 N.C. App. 279, 359 S.E.2d 505 (1987), cert. denied, 321 N.C. 473, 365 S.E.2d 1 (1988), overruled on other grounds, Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85 (1990).

If an employee's action would be barred by the Workers' Compensation Act, then a wrongful death action brought by the employee's representative is also barred. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Complaint Barred by Workers' Compensation Act. — Wrongful death complaint alleging that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death, came within the language of § 97-53(13) and was barred by the Workers' Compensation Act. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Claim Against Provider of Alcohol Barred by Decedent's Negligence. — Plaintiff's wrongful death claim against a provider of alcohol alleging wilful and wanton negligence for serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him was barred by the decedent's own actions in driving his vehicle while highly intoxicated. Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 423 S.E.2d 72 (1992).

Action Not Maintained Since Children Could Not Have Recovered For Injuries If They Had Lived. — The cause of action for the children's wrongful death, where the children were killed by their mother and her boyfriend as they were fleeing from police shortly before the truck they were in was blown up during the course of a gun battle and high speed chase with police, could not be maintained because the children could not have recovered for their injuries if they had lived, and the first requisite of a wrongful death action in this State is that the decedent could have recovered for his injuries if he had lived. Lynch v. North Carolina Dep't of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989).

Action Against Pharmacist. — While a pharmacist has no duty to advise absent knowledge of the circumstances, once a pharmacist is alerted to specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly; therefore, where plaintiff alleged, among other things, that her decedent "sought out and was relying upon the skill, judgment and expertise of defendant with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition," she stated a claim upon which relief could be granted. Ferguson v. Williams, 92 N.C. App. 336, 374 S.E.2d 438 (1988).

Payment of Expenses of Suit from Assets of Estates. — With the 1985 amendment of subsection (a) of this section, the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Prior to the 1985 amendment to subsection (a) of this section, there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on February 1, 1985, clerk properly denied petition seeking authorization of payment of litigation expenses out of decedent's estate, and superior court was correct in affirming the clerk's order. However, following the July 5, 1985 amendment there was nothing to prevent decedent's personal representatives from filing a new petition seeking to have those same expenses paid from the deceased's estate. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Contributory negligence of decedent, who was operating his vehicle in an impaired condition in violation of § 20-138.1, was a defense to a wrongful death claim under this section based on defendants' alleged negligence in selling alcohol to an intoxicated person. Clark v. Inn W., 89 N.C. App. 275, 365 S.E.2d 682, rev'd on other grounds, 324 N.C. App. 415, 379 S.E.2d 23 (1989).

Applied in Williams v. Odell, 90 N.C. App. 699, 370 S.E.2d 62 (1988); Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Stated in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

Cited in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); In re Ragan, 64 Bankr. 384 (Bankr. E.D.N.C. 1986); Woodson v. Rowland, 92 N.C. App. 38, 373 S.E.2d 674 (1988); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Doe v. American Nat'l Red Cross, 837 F. Supp. 121 (E.D.N.C. 1992).

III. PARTIES TO THE ACTION.

***Editor's Note.** — Annotations in the main volume under analysis line III, "Parties to the Action," and catchlined "Prenatal Death of Viable Child," should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Nor parent for death of child. — Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Prenatal Death of Viable Child. — This section allows recovery for the death of a viable but unborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

The Supreme Court's holding in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), permitting an action to recover for the destruction of a viable fetus en ventre sa mere, could be applied retroactively to an action commenced before DiDonato was decided. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

The definition of "viability" intended by the Supreme Court in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), is simply the common law definition of fetal capability to live independently of the mother. Although there is apparently no clear medical consensus as to the specific gestational age at which this capability is currently achieved, a gestational range of 20 to 26 weeks has been suggested. However, the determination of a fetus's viability is a question of fact. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

A wrongful death action may be maintained against a municipal corporation. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

Actions Against County Employees. — Plaintiff's complaint, claiming that social services employees defendants' negligent failure to investigate claims of child abuse and neglect, coupled with their failure to remove her son from the custody of his abusive father caused her son's death, contained allegations pertaining only to the defendants' actions or inactions in their official capacities with county department of social services and that defendants were entitled to judgment based on governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

IV. DISTRIBUTION OF RECOVERY.

***Editor's Note.** — The annotations to the case of Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969), appearing under this analysis line on pages 87 to 89 of the main volume, should be disregarded.*

Attorneys' Fees. — The 1985 amendment to this section provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

Attorney who neither initiated nor handled wrongful death claim and was appointed successor administrator only after wrongful death award had been made, but who expended considerable time in determining the correct distribution of wrongful death proceeds, could be compensated for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

"Costs" of an estate would not be payable from wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

V. DAMAGES RECOVERABLE.

A. In General.

***Editor's Note.** — The annotation in the main volume under analysis line V A, "Damages Recoverable, In General," and catchlined "Prenatal Death of Viable Child," should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Basis for Damages Generally. — This section allows the personal representative, on behalf of the statutory beneficiaries of the estate, to recover, inter alia, the present monetary value of the decedent to the beneficiaries. The measure is the worth of the decedent; how well off the beneficiaries are absent the decedent is immaterial. Harris v. United States, 121 F.R.D. 652 (W.D.N.C. 1988).

Question as to Economic Loss to Estate Not Error. — Where plaintiff's lawyer asked doctor "Do you have an opinion as to the present value of the economic loss to the estate?", defendant was correct in pointing out that recovery of damages under the statute is to the beneficiaries of the decedent and not to the decedent's estate; however, it was plain from the record that both doctor and the jury understood the correct measurement of damages under the wrongful death statute. Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

Negative Factors Held Relevant to Present Monetary Value. — Evidence regarding 19 year old decedent's low level of educational attainment, absence of regular employment, status of dependency on her parents, and history of alcohol and drug abuse was clearly relevant to a determination of her "present monetary value ... to the persons entitled to receive the damages recovered," and the jury could conclude that these negative factors offset, to the extent found, what decedent's present monetary value would have been in their absence. Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985), upholding award of damages in the amount of $5,000.

Under Subsection (b)(4), only reasonably expected net income of decedent can be recovered. Victim's parents, his only survivors, could only recover the amount of his income that they reasonably might have received had he lived. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Trial Court Erred in Application of This Section. — Although the trial court properly used the wrongful death statute to compute the amount of restitution which defendant found guilty of misdemeanor death by vehicle should pay, it erred in its application of this section. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Certain increased medical ex-

penses as well as funeral bills incident to the death of a 40 week-old fetus could only be recovered by the administrator of the fetal estate pursuant to an action under this section. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Hedonic damages are not recoverable under subdivision (b) of this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Trial Court Should Submit to Jury Separate Issues for Compensatory and Punitive Damages. — In wrongful death action, trial court should submit to jury separate issues for compensatory and punitive damages when evidence supports submission of these issues. Jones v. McCaskill, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

Double Recovery Not Permitted. — Because recovery for any diminishment in the quality of life of the survivors in a wrongful death case is already addressed in effect under subdivisions (b)(4)b and (b)(4)c, allowance of separate hedonic damages would result in double recovery. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Relevant Evidence. — Evidence pertaining to disease of plaintiff's decedent and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which were in controversy in wrongful death action. The evidence was therefore relevant and should have been admitted on that ground. Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

B. Pain and Suffering.

However, Decedent Must Have Been Conscious. — In an action under the Federal Tort Claims Act arising out of a vehicular accident, the extent of the accident inflicted massive head injuries making it improbable that the decedent was conscious following the collision, and therefore ruling out recovery for post-accident pain and suffering. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

C. Burial Expenses.

Prenatal Death of Viable Child. — Medical and funeral expenses, as well as punitive and nominal damages, should be allowed in the case of a decedent fetus where appropriate. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

D. Loss of Decedent's Income, Services, Society, etc.

Prenatal Death of Viable Child. — Lost income damages normally available under subdivision (b)(4)a cannot be recovered in an action for the wrongful death of a stillborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Damages normally recovered under subdivision (b)(4)b and c, for loss of services, companionship, advice and the like, will not be available in an action for the wrongful death of a viable fetus. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Loss of bloodline and denial of grandchildren are not grounds for recovery under this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Showing of Actual Support of Parents Not Required. — Trial judge did not err by instructing the jury that it could award damages to decedent's parents for the loss of her net income; there is no reason to demand actual support of the parents as the sole ground for any recovery of lost income since such a requirement would run counter to the remedial purpose of the statute and to the evidentiary provisions of subsection (c). Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

E. Punitive Damages.

Three Categories of Conduct Affording Recovery. — By providing for recovery of punitive damages upon a showing of "maliciousness, wilful or wanton injury, or gross negligence" it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Recovery for Gross Negligence

Even Absent Wilful or Wanton Conduct. — This section allows recovery of punitive damages in wrongful death actions involving gross negligence even when no wilful or wanton conduct was involved. To establish gross negligence, the plaintiff must show negligence of an aggravated character. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142 (1991).

Gross Negligence, etc. —

In accord with second paragraph in the main volume. See Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort-feasors. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Recovery from Municipal Corporations. — This section, the North Carolina Wrongful Death Act, contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

When Directed Verdict Proper as to Claim for Punitive Damages. — In a wrongful death action arising out of negligence, a directed verdict may properly be granted against a plaintiff seeking punitive damages only where the evidence is insufficient as a matter of law to support a jury finding that the defendant wrongfully caused the death of the decedent in a malicious, wilful, wanton or grossly negligent manner. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Evidence Sufficient to Support Award of Punitive Damages. — Evidence of truck driver's driving record was sufficient for jury to find that trucker was an unsafe driver, that company for which he worked either knew or should have known of his danger to the rest of the driving public, and given the number and severity of his offense, was equally sufficient to support the jury's finding that company's negligent entrustment was wilful or wanton, so as to justify denial of defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of company's negligent entrustment. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Personal Representative's Claim Not Barred for Failure to Join with Parents. — Administratrix's claim for punitive damages for death of stillborn child was not barred merely because it was not joined with the settled claim of the parents; if defendants wished to allege that part of the moneys the parents received in settlement of their claims was for punitive damages, defendants would have a right to support that contention with evidence and have the jury consider it in evaluating the administratrix's claim for punitive damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

§ 28A-18-3. To sue or defend in representative capacity.

CASE NOTES

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims.

(a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

(1) By delivery in person or by mail to the personal representative, collector or clerk of superior court. Such claim will be deemed to have been presented from the time of such delivery.

(2) By mailing, registered or certified mail, return receipt requested, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent.

(3) By delivery to the clerk of court of the county in which the estate is pending, which notice shall be filed in the appropriate estate file and copy mailed first class by the clerk of superior court at the expense of the claimant to the personal representative, collector, or his agent. The claim will be deemed to have been presented from the time of delivery to the clerk of court.

(b) In an action commenced after the death of the decedent against his personal representative or collector as such, the commencement of the action in the court in which such personal representative or collector qualified will constitute the presentation of a claim and no further presentation is necessary. In an action filed in any other court such claim will be deemed to have been presented at the time of the completion of service of process on such personal representative or collector.

(c) In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative or collector for the decedent or motion therefor will constitute the presentation of a claim and no further presentation is necessary. Such claim will be deemed to have been presented from the time of the substitution, or motion therefor. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 645, s. 1.)

Effect of Amendments. — The 1985 amendment, effective July 8, 1985, and applicable to estate of decedents dying on or after that date, substituted "in person or by mail to the personal representative, collector or clerk of superior court" for "to the personal representative or collector" at the end of the first sentence of subdivision (a)(1), substituted "registered or certified mail, return receipt requested" for "first-class mail" in the first sentence of subdivision (a)(2), substituted "from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent" for "from the time of deposit of the claim enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care of the United States Postal Service" at the end of the second sentence of subdivision (a)(2), and added subdivision (a)(3).

CASE NOTES

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt this section and § 28A-19-3 in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993).

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-3. Limitations on presentation of claims.

(a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. Provided further, if the expiration of said 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to each creditor, if any, shall be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, except claims of the United States and tax claims of the State of North Carolina and subdivisions thereof whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

(1) With respect to any claim based on a contract with the personal representative or collector, within six months after the date on which performance by the personal representative or collector is due;

(2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

(c) Except as otherwise provided by subsection (f) of this section, no claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

(d) All claims of creditors upon whom there has been personal service of notice as provided in G.S. 28A-14-3 are forever barred unless presented to the personal representative or collector within the time and manner set out in this Article.

(e) Except as otherwise provided by subsection (f) of this section, unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 within the time provided by subsection (a) of this section, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(f) All claims barrable under the provisions of subsections (a) and (b) hereof shall, in any event, be barred if the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within three years after the death of the decedent.

(g) Nothing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with.

(h) The word "claim" as used in this section does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees.

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; or

(2) Any proceeding or action to establish the liability of the decedent or personal representative; or

(3) The recovery on any judgment against the decedent or personal representative

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1979, c. 509, s. 1; 1989, c. 378, s. 3; c. 485, s. 65.)

Editor's Note. —

Session Laws 1989, c. 485, s. 67, is a severability clause.

Effect of Amendments. — Session Laws 1989, c. 378, s. 3, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, in subsection (a), inserted "G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors", and added the last sentence; substituted "Except as otherwise provided by subsection (f) of this section, no claim" for "No claim" in subsection (c); and in subsection (e) substituted "Except as otherwise provided by subsection (f) of this section, unless a claim" for "Unless a claim", and substituted "within the time provided by subsection (a) of this section" for "by the date specified in the general notice to creditors as provided in G.S. 28A-14-1."

Session Laws 1989, c. 485, s. 65, effective June 28, 1989, inserted "or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment" at the end of subsection (i).

Legal Periodicals. —

For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

CASE NOTES

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt § 28A-19-1 and this section in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993).

Language of subsection (i) provides an exception to limitations only for claims where there is insurance under which a decedent was insured. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Recovery Limited After Six Months. — Automobile accident victim who filed suit more than six months after the accident was limited in his amount of recovery by the amount of the deceased defendant's automobile insurance. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Under Subsection (i) Plaintiff Barred from Claim Greater Than Underinsurance Coverage. — Where, pursuant to subsection (i) of this section, all that plaintiff could recover from the underinsured decedent was the $25,000.00 coverage the decedent had under his policy with insurer, plaintiff, who was only legally entitled, by statute, to recover this amount, and nothing more, from decedent could not bring a claim for a greater amount against insurer under his underinsured motorist endorsement. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Claim for Compensation for Occupation of Property Not Barred Where Presented Within Period under Section. — A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period under this section and was therefor not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Reopening of Estate After Six-Month Period. — The provision in § 28A-23-5 prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in this section on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Applied in Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984); Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991); State Farm Mut. Auto. Ins. Co. v. Blackwelder, 332 N.C. 135, 418 S.E.2d 229 (1992); Ragan v. Hill, 110 N.C. App. 648, 430 S.E.2d 489 (1993).

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-19-5. Contingent claims.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-6. Order of payment of claims.

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand dollars ($2,000). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand dollars ($2,000) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C.S., s. 93; 1941, c. 271; 1955, c. 641, s. 1; 1967, c. 1066; 1973, c. 1329, s. 3; 1981, c. 383, ss. 1, 2; 1987, c. 286.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" in two places in the paragraph relating to the second class.

§ 28A-19-8. Funeral expenses of decedent.

CASE NOTES

Section Does Not Limit Collection of Expenses Exclusively to an Estate. — This section does not limit collection of funeral expenses exclusively to the estate. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Other Person's Promise to Pay Funeral Expenses. — Defendant's alleged promise to pay funeral expenses for his deceased father if the estate did not was a promise to pay the debt of another, which is void by law unless in writing. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991), holding, however, that as defendants did not specifically plead the statute of frauds, it was not available as a defense.

§ 28A-19-12. Claims due representative not preferred.

CASE NOTES

Attorneys' Fees and Commissions. — This section does not apply to the payment of attorneys' fees and commissions. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Claims by Personal Representative. — This section applies to "claims" against the estate, such as liens against property, funeral expenses, taxes, and judgments, where the claimant also happens to be the personal representative of the estate. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-19-15. Disputed claim may be referred.

CASE NOTES

Agreement to Refer Lacking. — Where the executor's letter to claimant merely stated that he "would suggest" that claimant "file a notice of hearing with the Clerk of Court" the language did not show that there was any agreement to refer the matter. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

This statute provides the only procedure for the resolution of a rejected claim. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994).

This section applies to creditors' claims against an estate and not to the interests of heirs. The cases construing this Article involve actions by creditors to recover debts. Moreover, § 28A-19-3(h) expressly provides that the word "claim" as used in this Article "does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees." Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Three Calendar Months Not Equal to 90 Days. — Plaintiff had three calendar months, not 90 days, in which to file an action, thus the trial court erred in dismissing plaintiff's cause of action based on the statute of limitations. Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

Cited in Blalock v. Dandelake, 90 N.C. App. 461, 368 S.E.2d 891 (1988).

ARTICLE 21.

Accounting.

§ 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, for so long as any of the property of the estate remains in his control, custody or possession, file annually in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year. Such accounts shall be due by the fifteenth day of the fourth month after the close of the fiscal year selected by the personal representative or collector, and annually thereafter. The election of a fiscal year shall be made by the personal representative or collector upon filing of the first annual account. In no event may a personal representative or collector select a fiscal year-end which is more than twelve months from the date of death of a decedent or, in the case of trust administration, the date of the opening of the trust. Any fiscal year selected may not be changed without the permission of the clerk of superior court.

The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C.C.P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C.S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1981, c. 955, s. 1; 1987, c. 783, s. 1; 1991, c. 485, s. 1.)

Effect of Amendments. — The 1987 amendment, effective August 12, 1987, inserted the present second sentence.

The 1991 amendment, effective October 1, 1991, divided the former single paragraph into the present first and second paragraphs, and in the first paragraph substituted "for" for "within 30 days after the expiration of one year from the date of his qualification and annually" near the beginning of the first sentence and inserted "annually" near the middle of the first sentence, and substituted the last four sentences for a sentence which read: "The clerk of superior court in his discretion may allow the personal representative or collector to adopt a substitute date for the filing of the first and subsequent annual accounts; provided that the first account using the substitute date must be filed within one year of the opening of the estate or filing of a previous annual account."

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If no inheritance tax return was required to be filed for the estate under G.S. 105-23 because the estate met the requirements of subsection (b) of that section, the personal representative or collector shall so certify in the final account filed with the clerk of superior court. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(a)(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(b) Except as provided in subsection (a), after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, if all of the debts and other claims against the estate of the decedent duly presented and legally owing have been paid in the case of a solvent estate or satisfied pro rata according to applicable statutes in the case of an insolvent estate, the personal representative or collector may file his final account to be reviewed, audited and recorded by the clerk of superior court. Nothing in this subsection shall be construed as limiting the right of the surviving spouse or minor children to file for allowances under G.S. 30-15 through 30-18 and the right of a surviving spouse to file for property rights under G.S. 29-30. (C.C.P., s. 481; Code, s. 1402; Rev., s. 103; C.S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2; 1981 (Reg. Sess., 1982), c. 1221, s. 3; 1985, c. 82, s. 3; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 3; 1989, c. 770, s. 9.)

Editor's Note. —

Session Laws 1985, c. 656, which amended this section, provided in s. 55: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 provided that the act would not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as the franchise tax credit under § 105-120.2(d) (now repealed) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

Effect of Amendments. — The 1985 amendment by c. 82, s. 3, effective July 1, 1985, and applicable to the estates of decedents dying on or after that date, substituted "one hundred thousand dollars ($100,000)" for "seventy-five thousand dollars ($75,000)" in the second sentence of subsection (a).

The 1985 amendment by c. 656, s. 3.1, effective Aug. 1, 1985, and applicable to the estates of decedents dying on or after that date, substituted "seventy-five thousand dollars ($75,000)" for "one hundred thousand dollars ($100,000)" in the second sentence of subsection (a).

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, and applicable to the estates of decedents dying on or after that date, rewrote the second sentence of subsection (a).

The 1989 amendment, effective August 12, 1989, substituted "G.S. 105-2(a)(3)" for "G.S. 105-2(3)" in the third sentence of subsection (a).

§ 28A-21-4. Clerk may compel account.

CASE NOTES

Cited in In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804 (1985); Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

ARTICLE 22.

Distribution.

§ 28A-22-1. Scheme of distribution; testate and intestate estates.

CASE NOTES

Cited in Lee v. Barksdale, 83 N.C. App. 368, 350 S.E.2d 508 (1986).

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-23-2. Payment into court of fund due minor.

When any personal representative or collector holds property due a minor without a guardian and desires to file his petition for settlement, he may deliver the property to the clerk of superior court who shall invest upon interest or otherwise manage said property for the use of the minor or the clerk may proceed to appoint a guardian for the minor pursuant to the provisions of Chapter 35A of the General Statutes and then may deliver the property of the minor to the guardian. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C.S., s. 153; 1965, c. 815, s. 3; 1973, c. 1329, s. 3; 1987, c. 550, s. 17.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A" for "Chapter 33."

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

CASE NOTES

Purpose of Subsection (b). — Subsection (b) of this section ensures that the personal representative's commission on a sale of real estate is limited to the amount that was actually needed for the payment of claims. This discourages personal representatives from selling land merely to increase their commissions. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Discretion of Clerk. — The allowance of a commission to an executor is a matter within the original jurisdiction of the clerk of the superior court and it is within his discretion to fix the amount, subject to the maximum provided by statute. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

An executor has no right to fix and determine compensation to be received by him. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

It is necessary for the executor to file a petition for commissions and fees along with the annual accountings to enable the clerk to determine the amount of the commission and attorneys' fees. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Payment of Commissions Held Proper. — Commissions to the executor of an estate could be paid on proceeds from the sale of real estate where the executor was required to sell the property under the terms of the will and the property was not sold to pay debts or legacies. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

CASE NOTES

Fees awarded under this section should be for actual services rendered and should not be based solely upon the size of the estate; nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

§ 28A-23-5. Reopening administration.

CASE NOTES

"Proper Cause" to Reopen. — The existence of a valid claim against an estate which is not time-barred may, in an appropriate case, constitute "proper cause" to reopen a closed estate in order to assert the claim. However, claims which are already barred may not be asserted in a reopened administration. Thus, without more, a claim which is barred by the statute of limitations may not constitute "proper cause" to reopen administration of a closed estate. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Reopening of Estate After Six-Month Period. — The provision in this section prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in § 28A-19-3 on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Estate Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

ARTICLE 25.

Small Estates.

§ 28A-25-1. Collection of property by affidavit when decedent dies intestate.

(a) When a decedent dies intestate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12-1, or an heir or creditor of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir or creditor or the public administrator stating:

(1) The name and address of the affiant and the fact that he or she is the public administrator or an heir or creditor of the decedent;

(2) The name of the decedent and his residence at time of death;

(3) The date and place of death of the decedent;

(4) That 30 days have elapsed since the death of the decedent;

(5) That the value of all the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed ten thousand dollars ($10,000);

(6) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;

(7) The names and addresses of those persons who are entitled, under the provisions of the Intestate Succession Act, to the personal property of the decedent and their relationship, if any, to the decedent; and

(8) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy thereof shall be mailed by the clerk to the persons shown in the affidavit as entitled to the personal property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1973, c. 1329, s. 3; 1975, c. 300, s. 9; 1983, c. 65, s. 1; c. 713, s. 21; 1985, c. 651, s. 1; 1989, c. 407, s. 1.)

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, rewrote the catchline to this section, which formerly read "Property collectible by affidavit; contents of affidavit," and inserted "or creditor" following "heir" in two places in the introductory language of subsection (a) and in subdivision (a)(1).

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a), in the introductory language, inserted "the public administrator appointed pursuant to G.S. 28A-12-1, or" and inserted "or the public administrator," and inserted "the public administrator or" in subdivision (1).

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under this section, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Cited in Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887.

§ 28A-25-1.1. Collection of property by affidavit when decedent dies testate.

(a) When a decedent dies testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee, stating:

(1) The name and address of the affiant and the fact that he is the public administrator, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent;
(2) The name of the decedent and his residence at time of death;
(3) The date and place of death of the decedent;
(4) That 30 days have elapsed since the death of the decedent;
(5) That the decedent died testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value;
(6) That the decedent's will has been admitted to probate in the court of the proper county and a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of his death;
(7) That a certified copy of the decedent's will is attached to the affidavit;
(8) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;
(9) The names and addresses of those persons who are entitled, under the provisions of the will, or if applicable, of the Intestate Succession Act, to the property of the decedent; and their relationship, if any, to the decedent; and
(10) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy shall be mailed by the clerk to the persons shown in the affidavit as entitled to the property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1985, c. 651, s. 2; 1987, c. 670, s. 1; 1989, c. 407, s. 2.)

Editor's Note. — Session Laws 1985, c. 651, s. 7 made this section effective October 1, 1985.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, in the introductory language of subsection (a) substituted "leaving personal property, less liens and encumbrances thereon" for "leaving property real or personal or both, less liens and encumbrances," substituted "possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent" for "having possession of property belonging to the decedent," substituted "deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action" for "deliver the property," and substituted "an heir or creditor" for "heir, creditor, or devisee" in two places; substituted "heir or creditor" for "heir, creditor or devisee" in subdivision (a)(1); and substituted "leaving personal property, less liens and encumbrances thereon" for "leaving property, real or personal or both, less liens and encumbrances" in subdivision (a)(5).

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a), in the introductory language, deleted "an" preceding "heir or creditor," inserted "the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee," and substituted "heir, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee" for "heir or creditor," in subdivision (1), deleted "an" preceding "heir or creditor," and inserted "the public administrator, a person named or designated as executor in the will, devisee," and inserted "if applicable" in subdivision (9).

§ 28A-25-2. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to an affidavit meeting the requirements of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) is discharged and released to the same extent as if he dealt with a duly qualified personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in an action brought for that purpose by or on behalf of the persons entitled thereto. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) made the action necessary. The heir or creditor to whom payment, delivery, transfer or issuance is made is answerable and accountable therefore to any duly qualified personal representative or collector of the decedent's estate or to any other person having an interest in the estate. (1973, c. 1329, s. 3; 1985, c. 651, s. 3; 1987, c. 670, s. 2.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "property" for "personal property" in the first, second and third sentences, inserted "or 28A-25-1.1(a)" in the first and fourth sentences, and substituted "heir, creditor, or devisee" for "heir or creditor" near the beginning of the last sentence.

The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" in three places in this section and substituted "the heir or creditor" for "the heir, creditor or devisee" at the beginning of the last sentence.

§ 28A-25-3. Disbursement and distribution of property collected by affidavit.

(a) If there has been no personal representative or collector appointed by the clerk of superior court, the affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall:

(1) Disburse and distribute the same in the following order:
   a. To the payment of the surviving spouse's year's allowance and the children's year's allowance assigned in accordance with G.S. 30-15 through G.S. 30-33;
   b. To the payment of the debts and claims against the estate of the decedent in the order of priority set forth in G.S. 28A-19-6, or to the reimbursement of any person who has already made payment thereof;
   c. To the distribution of the remainder of the personal property to the persons entitled thereto under the provisions of the will or of the Intestate Succession Act; and

(2) File an affidavit with the clerk of superior court that he has collected the personal property of the decedent and the manner in which he has disbursed and distributed the same. This final affidavit shall be filed within 90 days of the date of filing of the qualifying affidavit provided for in G.S. 28A-25-1 or G.S. 28A-25-1.1. If the affiant cannot file the final affidavit within 90 days, he shall file a report with the clerk within that time period stating his reasons. Upon determining that the affiant has good reason not to file the final affidavit within 90 days, the clerk may extend the time for filing up to one year from the date of filing the qualifying affidavit.

(b) Nothing in this section shall be construed as changing the rule of G.S. 28A-15-1 and G.S. 28A-15-5 rendering both real and personal property, without preference or priority, available for the discharge of debts and other claims against the estate of the decedent. If it appears that it may be in the best interest of the estate to sell, lease, or mortgage any real property to obtain money for the payment of debts or other claims against the decedent's estate, the affiant shall petition the clerk of superior court for the appointment of a personal representative to conclude the administration of the decedent's estate pursuant to G.S. 28A-25-5. (1973, c. 1329, s. 3; 1983, c. 711, s. 1; 1985, c. 651, s. 4; 1987, c. 670, s. 3; 1989, c. 407, s. 3.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "the heir, creditor, or devisee" for "the heir or creditor", deleted "personal" preceding "property," and inserted "or G.S. 28A-25-1.1" in the introductory language of subsection (a), in the introductory language of subdivision (a)(1) substituted "the property" for "the same," in paragraph (a)(1)c deleted "personal" preceding "property" and inserted "of the will or," in subdivision (a)(2) inserted "or G.S. 28A-25-1.1" at the end of the second sentence and substituted "heir, creditor, or devisee" for "heir or creditor" in the third and final sentences, and in subsection (b) added the second sentence.

The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, substituted "the heir or creditor who has collected personal property" for "the heir or creditor or devisee who has collected property" in the introductory language of subsection (a), substituted "the same" for "the property" in the introductory language of subdivision (a)(1), inserted "personal" preceding "property" in paragraph (a)(1)c and in the first sentence of subdivision (a)(2), and substituted "heir or creditor" for "heir, creditor or devisee" in the third and fourth sentences of subdivision (a)(2).

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a) substituted "affiant" for "heir or creditor" in the introductory language, and in the next to the last and last sentence of subdivision (2).

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

§ 28A-25-4. Clerk may compel compliance.

If any affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall fail to make distribution or file affidavit as required by G.S. 28A-25-3, the clerk of superior court may, upon his own motion or at the request of any interested person, issue an attachment against him for a contempt and commit him until he makes proper distribution and files the affidavit. In addition to or in lieu of filing this attachment, the clerk may require the affiant to post a bond conditioned as provided in G.S. 28A-8-2. (1973, c. 1329, s. 3; 1983, c. 711, s. 2; 1985, c. 651, s. 5; 1987, c. 670, s. 4; 1989, c. 407, s. 4.)

Effect of Amendments. —

The 1985 amendment, effective Oct. 1, 1985, inserted "creditor, or devisee" in the first and second sentences and in the first sentence deleted "personal" preceding "property" and inserted "or 28A-25-1.1."

The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" near the beginning of the first sentence and substituted "heir or creditor" for "heir, creditor or devisee" in the last sentence.

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, substituted "affiant" for "heir or creditor" in the first and second sentences.

CASE NOTES

Challenging Order under this Section. — Order of contempt and commitment entered against plaintiff-executor for failure to file account on estate and to appear and show cause was a valid court order pursuant to this section. In contesting this court order, plaintiff's proper course of action would have been to appeal the order itself. Instead, plaintiff attacked the order by seeking declaratory relief and the expunction of his records in a wholly separate action. The trial court had no authority to grant plaintiff the relief sought in that it had no power collaterally to vacate the order of contempt and commitment. Therefore, the trial court's dismissal of plaintiff's claim under Rules 12(b)(1) and (6) was proper. Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887, pet. disc. review denied, 334 N.C. 164, 432 S.E.2d 362 (1993).

§ 28A-25-5. Subsequently appointed personal representative or collector.

Nothing in this Article shall preclude any interested person, including the affiant, from petitioning the clerk of superior court for the appointment of a personal representative or collector to conclude the administration of the decedent's estate. If such is done, the affiant who has been collected personal property by affidavit shall cease to do so, shall deliver all assets in his possession to the personal representative, and shall render a proper accounting to the personal representative or collector. A copy of the accounting shall also be filed with the clerk having jurisdiction over the personal representative or collector. (1973, c. 1329, s. 3; 1975, c. 300, s. 10; 1985, c. 651, s. 6; 1987, c. 670, s. 5.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted "personal" preceding "property" in the second sentence.

The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" in the second sentence.

§ 28A-25-6. Payment to clerk of money owed decedent.

(a) As an alternative to the small estate settlement procedures of this Article, any person indebted to a decedent may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the decedent:

(1) If no administrator has been appointed, and

(2) If the amount owed by such person does not exceed five thousand dollars ($5,000), and

(3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the decedent exceed five thousand dollars ($5,000).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one decedent would exceed five thousand dollars ($5,000), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed five thousand dollars ($5,000).

(c) If the sum tendered pursuant to this section would make the aggregate sum coming into the clerk's hands with respect to any one decedent exceed five thousand dollars ($5,000) the clerk shall appoint an administrator, or the sum may be administered under the preceding sections of this Article.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to this section would not exhaust funds received pursuant to this section, he may, in his discretion, appoint an administrator, or the funds may be administered under the preceding sections of this Article.

(e) The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section is a full release to the debtor for the payment so made.

(f) If no administrator has been appointed, the clerk of superior court shall disburse the money received under this section for the following purposes and in the following order:

(1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;

(2), (3) Repealed by Session Laws 1981, c. 383, s. 3.

(4) All other claims shall be disbursed according to the order set out in G.S. 28A-19-6.

Notwithstanding the foregoing provisions of this subsection, the clerk shall pay, out of funds provided the deceased pursuant to G.S. 111-18 and Part 3 of Article 2 of Chapter 108A of the General Statutes of North Carolina, any lawful claims for domiciliary care received by the deceased, incurred not more than 90 days prior to his death. After the death of a spouse who died intestate and after the disbursements have been made in accordance with this subsection, the balance in the clerk's hands belonging to the estate of the decedent shall be paid to the surviving spouse, and if there is no surviving spouse, the clerk shall pay it to the heirs in proportion to their respective interests.

(g) The clerk shall not be required to publish notice to creditors.

(h) Whenever an administrator is appointed after a clerk of superior court has received any money pursuant to this section, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commissions for payments made to the administrator, and the administrator shall receive no commissions for receiving such payments. (1921, c. 93; Ex. Sess. 1921, c. 65; C.S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1955, c. 1246, ss. 103; 1957, c. 491; 1959, c. 795, ss. 1-4; 1965, c. 576, s. 1; 1973, c. 23; c. 1329, s. 1; 1975, c. 344; 1979, c. 163; c. 762, s. 1; 1981, c. 383, s. 3; 1983, c. 65, s. 2; 1987, c. 282, s. 6; 1989 (Reg. Sess., 1990), c. 1015, s. 1.)

Effect of Amendments. —

The 1987 amendment, effective June 4, 1987, substituted "Part 3 of Article 2 of Chapter 108A" for "Part 6 of Article 2 of Chapter 108" near the beginning of the second paragraph of subsection (f).

The 1989 (Reg. Sess., 1990) amendment, effective October 1, 1990, and applicable to the funds of all decedents dying on or after that date, substituted "decedent" for "intestate" in the catchline; and throughout the section, substituted "a decedent" for "an intestate" in the introductory paragraph of subsection (a), and deleted "or distributees" following "heirs" in the second sentence of the second paragraph in subsection (f).

ARTICLE 27.

Apportionment of Federal Estate Tax.

§ 28A-27-1. Definitions.

For the purposes of this Article:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax.

(2) "Fiduciary" includes a personal representative and a trustee.

(3) "Person" means any individual, partnership, association, joint stock company, corporation, governmental agency, including any multiples or combinations of the foregoing as, for example, individuals as joint tenants.

(4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent any property or interest therein included in the decedent's taxable estate.

(5) "State" means any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(6) "Tax" means the net Federal Estate Tax due, after application of any available unified transfer tax credit, and interest and penalties imposed in addition to the tax. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess. 1986), c. 878, s. 3 made this Article effective October 1, 1986. As to the applicability of the provisions of this Article, see § 28A-27-9.

§ 28A-27-2. Apportionment.

(a) Except as otherwise provided in subsection (b) of this section, or in G.S. 28A-27-5, G.S. 28A-27-6, or G.S. 28A-27-8, the tax shall be apportioned among all persons interested in the estate in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values as finally determined for federal estate tax purposes shall be used for the purposes of this computation.

(b) In the event the decedent's will provides a method of apportionment of the tax different from the method provided in subsection (a) above, the method described in the will shall control. However, in the case of any will executed on or after October 1, 1986, a general direction in the will that taxes shall not be apportioned, whether or not referring to this Article, but shall be paid from the residuary portion of the estate shall not, unless specifically stated otherwise, apply to taxes imposed on assets which are includible in the valuation of the decedent's gross estate for federal estate tax purposes only by reason of Sections 2041, 2042 or 2044 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. In the case of an estate administered under any will executed on or after October 1, 1986, in the event that the estate tax computation involves assets described in the preceding sentence, unless specifically stated otherwise, apportionment shall be made against such assets and the tax so apportioned shall be recovered from the persons receiving such assets as provided in Sections 2206, 2207 or 2207A of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, s. 1.)

Effect of Amendments. — The 1987 amendment, effective July 29, 1987, inserted "However, in the case of any will executed on or after October 1, 1986" at the beginning of the second sentence of subsection (b) and inserted "In the case of an estate administered under any will executed on or after October 1, 1986" at the beginning of the third sentence of subsection (b).

§ 28A-27-3. Procedure for determining apportionment.

(a) The personal representative of a decedent shall determine the apportionment of the tax.

(b) If the personal representative finds that it is inequitable to apportion interest and penalties in the manner provided in this Article because such interest or penalties were imposed due to the fault of one or more persons interested in the estate he may direct apportionment thereon in the manner he finds equitable.

(c) The expenses reasonably incurred by the personal representative in connection with the apportionment of the tax shall be apportioned as provided for taxes under this Article. If the personal representative finds that it is inequitable to apportion the expenses because such expenses were incurred because of the fault of one or more persons interested in the estate he may direct other more equitable apportionment. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-4. Uncollected tax.

The personal representative shall not be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the six months next following final determination of the tax. A personal representative who institutes the suit or proceeding within a reasonable time after the six months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be apportioned among the other persons interested in the estate who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person interested in the estate bears to the total value of the interests of all remaining persons interested in the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-5. Exemptions, deductions, and credits.

(a) Any interest for which a deduction or exemption is allowed under the federal revenue laws in determining the value of the decedent's net taxable estate, such as property passing to or in trust for a surviving spouse and gifts or bequests for charitable, public, or similar purposes, shall not be included in the computation provided for in G.S. 28A-27-2 to the extent of the allowable deduction or exemption. When such an interest is subject to a prior present interest which is not allowable as a deduction or exemption, such present interest shall not be included in the computation provided for in this Article and no tax shall be apportioned to or paid from principal.

(b) Any credit for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment; provided, however, that if the tax which gives rise to such a credit has in fact been paid by a person interested in the estate, the benefit of such credit shall inure to that person paying the tax.

(c) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.

(d) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowed deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Article, and to that extent no apportionment shall be made against the property. This section does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954 of the United States or corresponding provisions of any subsequent tax law, relating to deduction for State death taxes on transfers for public charitable or religious uses. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, ss. 2, 3.)

Effect of Amendments. — The 1987 amendment, effective July 29, 1987, substituted "allowed" for "allowable" near the beginning of the first sentences of subsections (a) and (d).

§ 28A-27-6. No apportionment between temporary and remainder interests.

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-7. Fiduciary's rights and duties.

(a) The personal representative may withhold from any property of the decedent in his possession, distributable to any person interested in the estate, the amount of the tax apportioned to his interest. If the property in possession of the personal representative and distributable to any person interested in the estate tax is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative he may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Article.

(b) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the clerk of superior court having jurisdiction of the administration of the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-8. Difference with Federal Estate Tax Law.

If the liabilities of persons interested in the estate as prescribed by this Article differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this Article shall apply as if the resulting liabilities had been prescribed herein. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-9. Effective date.

The provisions of this Article shall not apply to taxes due on account of the death of decedents dying prior to October 1, 1986. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Legal Periodicals. —

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Cited in In re Estate of Finch, 97 N.C. App. 489, 389 S.E.2d 126 (1990).

§ 29-2. Definitions.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Role'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
III. Estate.
IV. Net Estate.
VI. Heirs.
VII. Lineal Descendants.
VIII. Costs of Administration.

I. GENERAL CONSIDERATION.

Cited in Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

III. ESTATE.

"Estate" Defined. — Estate of a decedent includes all property owned by decedent which she may direct to her legatees and devisees under will and which would pass to her heirs and next of kin under laws of intestacy if she died without will. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

IV. NET ESTATE.

Property Owned as Tenants by the Entirety. — The value of real property owned by couple as tenants by the entirety should not be included in testatrix's net estate for purposes of the dissent statute. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, cert. denied, 325 N.C. 708, 388 S.E.2d 456 (1989).

VI. HEIRS.

Technical Construction of Term "Heirs." — Absent words expressing testatrix' contrary intent, the court would construe the word "heirs" in will in the technical sense. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Consideration of Laws in Effect at Time of Death. — In construing a will with a remainder interest to a class of the testatrix' "heirs," the courts look to the intestacy laws in effect at the testatrix' death to determine who the "heirs" are and the shares which they are entitled to take, unless the language of the will reveals a contrary intent. Rawls v.

Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

For discussion of construction of the phrase "to my nearest (relatives) heirs" in the remainder clause of a devise by testatrix who died in May, 1962, see Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

VII. LINEAL DESCENDANTS.

Children Distinguished from Others. — The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Illegitimate and Adopted Children Included. — The term "lineal descendants" would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Children Adopted by Wife's Second Husband. — Children born to wife and her first husband became lineal descendants of her second husband upon his adoption of them because they became in law his children. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

VIII. COSTS OF ADMINISTRATION.

Costs of administration, as used in subdivision (5) of this section, means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In re Estate of Ward, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

§ 29-4. Curtesy and dower abolished.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

Cited in Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

§ 29-5. Computation of next of kin.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Editor's Note. — The case of In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967), cited under this section in the main volume, has been abrogated by statute. See § 41-6.1.

§ 29-8. Partial intestacy.

CASE NOTES

Section Codifies Common Law. — This section, which was adopted in 1959, was a codification of the common law. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Section Adopts Majority Rule. — The rule adopted by this section is also in accordance with the rule followed by a majority of the sister states. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

This section creates a mandatory plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession without regard to the intent expressed by a testator in a will. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Presumption against partial intestacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will. The presumption must yield when outweighed by manifest and unequivocal intent. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

Illustrative Case. — Where, as gleaned from will itself, the intent of the testator was that the residue of his estate was to pass to named beneficiaries under the residuary clause of the will only if testator's wife survived him, and she did not, the residue would pass to his heirs at law in accordance with the laws of intestacy as enacted by the legislature. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

§ 29-9. Inheritance by unborn infant.

Legal Periodicals. — For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 29-10. Renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to October 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Collateral Attack. — The legality of plaintiff's renunciation under this section as it read prior to Oct. 1, 1975, was a matter before the clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's "Petition to Renounce." As a party to the original action, plaintiff could not later collaterally attack it. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

Editor's Note. — Session Laws 1979, c. 186, s. 1, which became effective October 1, 1979, and was applicable to the estates of decedents dying on or after that date, rewrote this section to read as follows:

"§ 29-14. *Share of surviving spouse.*

"(a) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-half of the balance of the net estate; or

"(b) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-third of the balance of the net estate; or

"(c) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net estate does not exceed twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be twenty-five thousand dollars ($25,000) in value plus one-half of the balance of the net estate; or

"(d) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, the share of the surviving spouse shall be the entire net estate.

"(e) If under subsections (a), (b), or (c) of this section the surviving spouse is not entitled to the entire net estate, the surviving spouse may elect to take his or her share wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the surviving spouse may elect. The election of the surviving spouse may be made by written instrument filed with the personal representative within seven months after the issuance of letters testamentary or letters of administration. By agreement between the personal representative and the surviving spouse, or by order of the Clerk of Superior Court upon good cause shown, the seven month period for the surviving spouse's election may be extended. If the surviving spouse is the personal representative, any extension shall be granted by the Clerk of Superior Court. If no election is filed within seven months, and no extension has been agreed to or ordered, the personal representative shall distribute the share of the surviving spouse wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the personal representative may determine."

For the version of this section as in effect prior to the 1979 amendment, see Session Laws 1959, c. 879, s. 1.

Session Laws 1981, c. 69, which became effective March 5, 1981, and is applicable to estates of persons dying on or after that date, again rewrote this section, to read as set out in the main volume.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Quoted in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Stated in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

Cited in Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985); In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Applied in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Stated in Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

Cited in McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988); Brimley v. Logging, 93 N.C. 467, 378 S.E.2d 52 (1989); Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

There is no logical reason for the Court of Appeals to favor a per capita distribution over a per stirpes distribution absent the intent of the testatrix as ascertained from the four corners of the will. Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Applied in Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Jamin v. Williamson, 94 N.C. App. 699, 381 S.E.2d 345 (1989).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under this section. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The purpose of subsection (e) of this section is to make it clear that the relationship of parent and child is not severed when the child is adopted by the spouse of the biological parent. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Biological Parent Need Not Join in Spouse's Petition for Adoption of Children. — Subsection (e) of this section and § 48-7(d) were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of § 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.

CASE NOTES

Cited in Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Legal Periodicals. — For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

In General. — Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the methods established in §§ 49-10 through 49-14, or if paternity has been established in an action for criminal nonsupport. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Birth certification amendment application form did not meet requirements of subsection (b) where it contained no statement by the putative father or anyone else that he was the father of the child, and even if his signature in the blank space involved could be construed to be an unambiguous acknowledgment of paternity, he did not swear to it before any official authorized to administer oaths. In re Will of Bunch, 86 N.C. App. 463, 358 S.E.2d 118 (1987).

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under subsection (a) of this section, and clearly includes adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Compliance with Section Essential. — Where there has been no compliance with this section, illegitimate child has no right to inherit from deceased putative father. Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986), cert. denied and appeal dismissed, 319 N.C. 224, 353 S.E.2d 402, cert. denied, 484 U.S. 824, 108 S. Ct. 88, 98 L. Ed. 2d 50 (1987).

Plea of Guilty in Bastardy Action as Basis for Inheritance by Child. — An illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity to the child by pleading guilty in a criminal bastardy action. Sanders v. Brantley, 71 N.C. App. 797, 323 S.E.2d 426 (1984).

This section confers upon illegitimate children same rights enjoyed by legitimate children under laws of intestate succession once there is proper adjudication or acknowledgment of paternity. Notification of the personal representative within six months of published notice to creditors does not establish or define the illegitimate child's right, but merely sets a time limitation for an illegitimate child to seek its enforcement. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Subsection (b) is Statute of Limitation. — The six-month limitation period in subsection (b), relating to notice of the claim of an illegitimate child to take from father's estate, is a statute of limitation which is subject to being tolled under the provisions of § 1-17. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applied in Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Cited in Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989).

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

For comment, "The Uniform Probate Code's 'Augmented Estate' Concept: A Remedy for the North Carolina Dissent Statute," see 12 Campbell L. Rev. 425 (1990).

Chapter 30.

Surviving Spouses.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

CASE NOTES

Quoted in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Sec.
31-5.4. Revocation by divorce or annulment; revival.
31-5.5. After-born or after-adopted child; illegitimate child; effect on will.
31-5.8. Revival of revoked will.

Article 5.

Probate of Will.

31-23. [Repealed.]
31-24. Examination of witnesses by affidavit.

Sec.
31-25, 31-25.1. [Repealed.]
31-27. Certified copy of will of nonresident recorded.

Article 6.

Caveat to Will.

31-37.1. Parties may enter into a settlement agreement.

Article 7.

Construction of Will.

31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.

Legal Periodicals. —

For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Applied in Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ 31-3.1. Will invalid unless statutory requirements complied with.

CASE NOTES

Codicil to a Will. — In North Carolina, a codicil to a will must be executed with the same formalities as the will. Consequently, a testamentary instrument that fails to follow the prescribed formalities is void. Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991).

§ 31-3.3. Attested written will.

CASE NOTES

I. General Consideration.
II. Signing by or for Testator.
III. Attestation by Witnesses.

I. GENERAL CONSIDERATION.

For a will to be admitted to probate, § 31-18.1(a)(1) requires that the will meet the requirements of this section and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

A codicil must be executed, etc. — In accord with main volume. See In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

Cited in In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992).

II. SIGNING BY OR FOR TESTATOR.

Assistance by Attorney. — Attorney's assisting testator to form his mark and signing testator's name legibly beside each mark did not disqualify him as a witness. In re Will of Jarvis, 334 N.C. 140, 430 S.E.2d 922 (1993).

Evidence that testator made his mark on codicil in the presence of the witnesses indicates that the instrument was his, and is sufficient to imply a request that they attest his signature. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

III. ATTESTATION BY WITNESSES.

Witnesses Need Not Sign in Presence of Each Other. —

Where witness who signed the will in a location different from the other two witnesses testified and stated in her affidavit that she was a witness to the testator's mark at the request of the testator, who declared the document to be his will, the trial court did not err in finding that witness was an attesting witness. Brickhouse v. Brickhouse, 110 N.C. App. 560, 430 S.E.2d 446 (1993).

§ 31-3.4. Holographic will.

CASE NOTES

II. Testamentary Intent.
IV. Found Among Valuable Papers, etc.

II. TESTAMENTARY INTENT.

Evidence of Testamentary Intent, etc. —

An instrument may not be probated as a testamentary disposition unless there is evidence that it was written with testamentary intent, that is, that the maker intended that the paper itself should operate as a will or codicil to take effect upon his death. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

Where Testamentary Intent Must Appear. —

In accord with the main volume. See Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

IV. FOUND AMONG VALUABLE PAPERS, ETC.

Evidence of Finding Among Valuables. —

Evidence as to whether the document in question was found among the valuable papers and effects of the deceased or in a safe place where it was deposited by her, in satisfaction of subdivision (a)(3) of this section, was sufficient to support the jury's determination that it was a valid holographic will. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

§ 31-4. Execution of power of appointment by will.

Legal Periodicals. — For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

A provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of this section. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

ARTICLE 2.

Revocation of Will.

§ 31-5.4. Revocation by divorce or annulment; revival.

Dissolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse. (1953, c. 1098, s. 6; 1977, c. 74, s. 3; 1991, c. 587, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, and applicable to the will of any person dying on or after that date, added "or annulment; revival" in the catchline, in the first sentence inserted "or annulment" near the beginning, substituted "former spouse or purported former spouse" for "spouse so divorced", and substituted the language beginning "any provision conferring a general or special power" for "the appointment of such spouse as executor or executrix", and added the second sentence.

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

(a) A will shall not be revoked by the subsequent birth of a child to the testator, or by the subsequent adoption of a child by the testator, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. 29-19(b), but any after-born, after-adopted or entitled after-born illegitimate child shall have the right to share in the testator's estate to the same extent he would have shared if the testator had died intestate unless:

(1) The testator made some provision in the will for the child, whether adequate or not, or

(2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child.

(b) The provisions of G.S. 28A-22-2 shall be construed as being applicable to after-adopted children and to after-born children, whether legitimate or entitled illegitimate.

(c) The terms "after-born," "after-adopted" and "entitled after-born" as used in this section refer to children born, adopted or entitled subsequent to the execution of the will. (1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C.S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541; 1973, c. 1062, s. 2; 1985, c. 689, s. 9.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 28A-22-2" for "G.S. 28-153 through 28-158" near the beginning of subsection (b).

CASE NOTES

A testator is not required to mention by name or make some provision for a child in order to disinherit that child under North Carolina law, even if the child is born or adopted after the will is made. Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985).

Adequacy of Provision for After-Born Child. — As long as a testator makes some provision in the will for an after-born child, whether adequate or not, the child has no right to take an intestate share of the testator's estate, and a class gift constituted a provision for an afterborn child, even though the gift was contingent. Mason v. Stanimer, 102 N.C. App. 673, 403 S.E.2d 605 (1991).

§ 31-5.8. Revival of revoked will.

No will or any part thereof that has been in any manner revoked can, except as provided in G.S. 31-5.4, be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10; 1991, c. 587, s. 2.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, and applicable to the will of any person dying on or after that date, substituted "that has been" for "which shall be" and inserted "except as provided in G.S. 31-5.4".

ARTICLE 3.

Witnesses to Will.

§ 31-8.1. Who may witness.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

§ 31-10. Beneficiary competent witness; when interest rendered void.

CASE NOTES

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

Jurisdiction of Clerk. — The clerk of the superior court has exclusive and original jurisdiction over the probate of wills. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-18.1. Manner of probate of attested written will.

CASE NOTES

For a will to be admitted to probate, subdivision (a)(1) of this section requires that the will meet the requirements of § 31-3.3 and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

§ 31-18.2. Manner of probate of holographic will.

CASE NOTES

Indicia of Holographic Will Held Sufficient. — Where caveators presented testimony that holographic writings were found among papers which included the titles to testator's car and housetrailer, copies of property deeds, health insurance papers, and cancelled bank notes, further testimony that testator duly executed his signature on the writings before a notary public, and the testimony of three witnesses who testified they were familiar with both the handwriting and signature of the testator and that they believed the subject writings and signatures to be in testator's own hand, caveators presented sufficient indicia of a holographic will under section 31-3.4 and they satisfied the requirements of this section; therefore, propounders' motion for directed verdict was properly denied. In re Will of Penley, 95 N.C. App. 655, 383 S.E.2d 385, cert. denied, 326 N.C. 48, 389 S.E.2d 93 (1990).

§ 31-23: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-24. Examination of witnesses by affidavit.

(a) The examination of witnesses to a will may be taken and subscribed in the form of an affidavit before a notary public or other person who is authorized to administer oaths in the jurisdiction where the examination is held.

(b) A photographic copy of the original will certified to be a true and exact copy thereof by the clerk of superior court of the county in which the will is to be probated may be used in the examination of the witnesses in the procedures set out in subsection (a); provided, the said clerk has in his possession the original will at the time of examination of the witnesses.

(c) Affidavits taken in accordance with subsection (a) shall be transmitted by the person taking the affidavit to the clerk of superior court of the county in which the will is to be probated.

(d) Testimony submitted in accordance with subsection (a) is competent in regard to all requirements of G.S. 31-3.3 and to establish that a will was executed in compliance with the requirements of G.S. 31-3.3.

(e) Nothing in this section is to limit or otherwise affect the authority of a clerk of superior court in the exercise of his authority as judge of probate under G.S. 28A-2-1 to:

(1) Issue subpoenas under G.S. 7A-103; or
(2) Order the taking of depositions of witnesses. (1917, c. 183; C.S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A; 1979, c. 226, s. 1; 1987, c. 78, s. 2.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§§ 31-25, 31-25.1: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-27. Certified copy of will of nonresident recorded.

(a) Subject to the provisions of subsection (b), if the will of a citizen or subject of another state or country is probated in accordance with the laws of that jurisdiction and a duly certified copy of the will and the probate proceedings are produced before a clerk of superior court of any county wherein the testator had property, the copy of the will shall be probated as if it were the original. If the jurisdiction is within the United States, the copy of the will and the probate proceedings shall be certified by the clerk of the court wherein the will was probated. If the jurisdiction is outside the United States, the copy of the will and probate proceedings shall be certified by any ambassador, minister, consul or commercial agent of the United States under his official seal.

(b) For a copy of a will probated under the provisions of subsection (a) to be valid to pass title to or otherwise dispose of real estate in this State, the execution of said will according to the laws of this State must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate, from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise in such certified copy of the will and probate proceedings.

(c) If the execution of the will in accordance with the laws of this State does not appear as required by subsection (b), the clerk before whom the copy is exhibited shall have power to take proof as prescribed in G.S. 31-24, and the will may be adjudged duly proved, and if so proved, the will shall be recorded as herein provided.

(d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C.C.P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C.S., s. 4152; 1941, c. 381; 1965, c. 995; 1987, c. 78, s. 3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

CASE NOTES

Applied in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. General Consideration.
II. Interested Persons.

I. GENERAL CONSIDERATION.

Filing of a caveat is the customary and statutory procedure, etc. — Questions as to the construction of a will may be brought in a declaratory judgment action; however, there are limitations to the use of a declaratory judgment action. Thus, a caveat proceeding and not declaratory judgment was appropriate to determine the validity of document. Rogel v. Johnson, 114 N.C. App. 239, 441 S.E.2d 558 (1994).

Superior Court Acquires No Jurisdiction When Purported Caveat Is Fatally Defective from Inception. — Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

The Contest Is a Special Proceeding in Rem. — A caveat is an in rem proceeding, perhaps more strictly so regarded than any other proceeding with which the courts deal. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

The rules peculiar to a caveat stem from the in rem nature of the proceeding. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Nonsuit Cannot Be Taken. — Because the caveat proceeding is in rem, the proceeding must go on until the issue devisavit vel non is appropriately answered; nonsuit cannot be taken by the propounders or the caveators. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Propounder Functions as Plaintiff. — It is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

An attack upon the validity of a will must be direct and in the form of a caveat. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

The trial court may not exclude from the caveat proceeding consideration of any script offered by an interested party which is relevant to the issue devisavit vel non. However, it does not mandate that the issues relating to all scripts be considered simultaneously. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Burden of Proof. — Although a caveat proceeding is an in rem proceeding without a plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Applied in Lash ex rel. Wilson v.

Lash, 107 N.C. App. 755, 421 S.E.2d 615 (1992).

II. INTERESTED PERSONS.

This section affords protection to any interested persons who do not receive notice. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Executor. — A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Membership in Congregation. — Membership in a church congregation, albeit distinguished membership, is too tenuous an interest to come within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-33. Bond given and cause transferred to trial docket.

Cross References. — For provisions requiring clerk to transfer issues of fact to civil issue docket, see § 1-273.

CASE NOTES

Court Had No Jurisdiction to Determine Will's Validity Where Plaintiff's Attempt to Initiate Caveat Was Part of Attack on Deed. — Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine question of will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When a purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Clerk's Findings Not Binding When Issue of Fact Raised. — Interested parties in a proceeding before a clerk of the Superior Court to probate a will in solemn form are not bound by the findings of the clerk where an issue of fact is raised by the parties. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Proceedings Transferred, etc. —

When a caveat is filed, the clerk of superior court transfers the proceeding to the civil issue docket of the superior court, to the end that the issue devisavit vel non may be tried by a jury. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Caveat filed without compliance with bond requirement under this section is not a valid attack upon the will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Who Are Necessary Parties. — Persons who qualify as persons interested in the estate are not necessarily equivalent to necessary parties. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Discretion of Court as to Necessary Parties. — The decision whether certain persons are necessary parties to the caveat proceeding is within the court's discretion. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Persons who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid are proper persons to receive notice and participate in the proceedings within the meaning of this section. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Beneficiaries under Previous Will. — Where caveators alleged that probated will was invalid on grounds of undue influence and lack of mental capacity and that they were beneficiaries under a will made at a time when the testator possessed mental capacity, if the facts were as caveators alleged, they were interested in the estate. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Heirs at law who have no knowledge of a caveat proceeding and who were not cited under this section are not estopped to file a second caveat, nor are they bound by the former judgment sustaining the validity of the script. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-34. Prosecution bond required in actions to contest wills.

CASE NOTES

This section is not applicable to a caveator. Therefore, a prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-36. Caveat suspends proceedings under will.

CASE NOTES

Stated in In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643 (1987).

§ 31-37.1. Parties may enter into a settlement agreement.

Prior to an entry of judgment by the superior court in a caveat proceeding, the parties may enter into a settlement agreement, whereupon judgment may be entered by the court, without a verdict by a jury, in accordance with the terms of the settlement agreement, either sustaining or setting aside the contested will. (1989 (Reg. Sess., 1990), c. 949, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 949, s. 2 made this section effective October 1, 1990, and applicable to all caveats to wills whether filed on, before or after that date.

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Rules of Construction.
III. Illustrative Cases.

I. GENERAL CONSIDERATION.

The presumption created by this section, etc. —

The rule that a devise of the "use of" property is the equivalent of a devise in fee ... has no application when a will shows an intent to pass an interest that is less than a fee. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Cited in Brinkley v. Day, 88 N.C. App. 101, 362 S.E.2d 587 (1987).

II. RULES OF CONSTRUCTION.

Intention of Testator. —

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

III. ILLUSTRATIVE CASES.

"Cash." — The word "cash" is not such a technical one that it will have the same definite and precise meaning in all circumstances. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

The word "cash" as used in a will includes bank accounts, both checking and savings and includes certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Use of the words "other cash," as used in a will, will not be interpreted by resorting to a narrow, technical definition or interpretation. Courts must look for the meaning of these words according to the subject treated and the context in which they were used. The intention of the testator is the polar star which must guide the courts in the interpretation of wills. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

"Remaining cash and bonds" included certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Language Insufficient to Show Intent to Pass Less Than Fee Simple Estate. —

The language "provided, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children" did not show the intestator's intention to convey a life estate. An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause purporting to dispose of what remains at his death is not allowed to defeat the devise or limit it to a life estate. Leonard v. Dillard, 87 N.C. App. 79, 359 S.E.2d 497 (1987); See Osborne v. Hodgin, 98 N.C. App. 111, 389 S.E.2d 629 (1990).

Devise Creating Life Estate. —

Decedent's unrestricted devise of certain property to plaintiff in Item 2 was a devise in fee simple and the later devise of the property to defendants in Item 7 did not limit plaintiff's estate to a life estate. Coble v. Patterson, 114 N.C. App. 447, 442 S.E.2d 119 (1994).

§ 31-40. What property passes by will.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

(a) Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue. The qualified issue shall take pursuant to the preceding sentence regardless of whether or not the deceased person dies before or after the making of the will. Where a devise or legacy of any interest in property is given to a person as a member of a class and the person predeceases the testator and is not survived by qualified issue, then, unless a contrary intent is indicated by the will, the entire interest of such person shall devolve upon the members of the class who survived the testator and the qualified issue of any members of the class who predeceased the testator, taking by substitution as herein provided.

(b) The term "qualified issue" as used in subsection (a) means issue of the deceased person who would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

(c) If subsection (a) is not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
  a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
  b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

(d) Renunciation of a devise or legacy shall be as provided for in Chapter 31B of the General Statutes. (1844, c. 88, s. 4; R.C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C.S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1; 1975, c. 371, s. 3; 1979, c. 525, s. 5; 1987, c. 86, ss. 1, 2; 1989, c. 244.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted the subsection catchlines of subsections (a) through (c), rewrote subsections (a) and (b), and substituted "If subsection (a) is not applicable" for "If subsections (a) and (b) above are not applicable" at the beginning of subsection (c).

The 1989 amendment, effective June 6, 1989 and applicable to the will of any person dying on or after that date, added the last sentence of subsection (a).

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

I. General Consideration.
II. Property Passing under Residuary Clause.
III. Devise or Legacy to Testator's Slayer.

I. GENERAL CONSIDERATION.

This section applies to all wills and provides means by which property is to be distributed in the event of failure of devises and legacies by lapse or otherwise. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Intent to Prevent Lapse. — Should the testator desire to prevent lapse, he must express his intent that the gift not lapse or must provide for substitution of another devisee to receive the gift. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Applied in North Carolina Nat'l Bank v. Apple, 95 N.C. App. 606, 383 S.E.2d 438 (1989).

Stated in Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Cited in McMillan v. Davis, 81 N.C. App. 433, 344 S.E.2d 595 (1986); In re Estate of Baumann, 93 N.C. App. 782, 379 S.E.2d 107 (1989).

II. PROPERTY PASSING UNDER RESIDUARY CLAUSE.

Construction of Residuary Clause, etc. —

No particular mode of expression is needed to constitute a residuary clause. All that is required is an adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the will. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Construction to Prevent Intestacy. —

It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

When the language of the will is definite and clear, the presumption that the will must be construed to prevent partial intestacy is generally not employed. If the language is unambiguous, then there is no need to resort to a construction of the will, and the expression of the testator must be given effect. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Applicability of Subdivision (c)(1)a. — Where it is clear from the residuary clause itself or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away should not fall into the residue, subdivision (c)(1)a does not apply. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Heirs who partake of a devise pursuant to this section are entitled to a share of a lapsed residuary gift; if the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue may also have participated in this lapsed gift. In re Will of Hubner, 105 N.C. App. 599, 414 S.E.2d 369 (1992).

Devise of Lapsed Residuary Gift. — Heirs who partake of a devise pursuant to the anti-lapse statute are entitled to a share of a lapsed residuary gift. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

Where residuary legatees would have taken a share of a lapsed gift had they survived, their daughters, who were qualified issue, could take the entire share to which residuary legatees would have taken had they survived. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

III. DEVISE OR LEGACY TO TESTATOR'S SLAYER.

Subsection (a) Rather Than Subdivision (c)(2) Applies. — If the court were to hold that subdivision (c)(2) of this section applies merely because the slayer does not, in fact, predecease the slain, the court would be ignoring the legislative scheme intended by the statutory presumption of the slayer's death. Moreover, subsection (c) expressly states that that subsection applies only if subsection (a) is not applicable, thus making subsection (a) the dominant or controlling statute. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption in § 31A-4(3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in § 31A-4(3) be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Distributed in Accord with Subsection (a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with subsection (a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with subsection (a). Because of the conclusive presumption in § 31A-4(3) that the slayer predeceased the testator, subsection (a), not subdivision (c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-43. General gift by will an execution of power of appointment.

Legal Periodicals. —
For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

Purpose of Section. —
In accord with the main volume. See First Citizens' Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Residuary Devise, etc. — A power of appointment upon which no restrictions are imposed is exercised by a residuary clause. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Chapter 31A.

Acts Barring Property Rights.

Article 3.

Willful and Unlawful Killing of Decedent.

Sec.
31A-11. Insurance benefits.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

CASE NOTES

Legislative Intent. — The apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Presumption of Adultery. — Adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Wife's Behavior as Inference of Adultery. — A married woman's refusal to testify about the nature of her relationship with two unmarried men, with whom she admitted cohabiting, and her failure to refute the charge of adultery logically gave rise to an inference of adultery. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Subdivision (b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Proceeding to set aside invalid divorce decree is not barred by death of one of the spouses where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Cited in In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

CASE NOTES

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Abandonment has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Or Wrongful Death Proceeds. — In accord with first paragraph in the main volume. See Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

This Article, the "slayer statute," applies only to felonious killings; it does not prevent the common law doctrine that no person will be allowed to profit from his own wrong from being applied in actions not under its provisions. In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

Failure to Proceed Within One Year. — Plaintiff's failure to proceed under the slayer statute within one year did not bar him from attempting to show that intestate's culpable negligence proximately contributed to the deaths of the decedents and that her estate could not profit from those wrongs. Lynch v. Newsom, 96 N.C. App. 53, 384 S.E.2d 284, cert. denied, 326 N.C. 48, 389 S.E.2d 90 (1990).

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985).

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

CASE NOTES

Presumption in Subdivision (3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in subdivision (3) of this section be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Slayer's Legacy Distributed in Accord with § 31-42(a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with § 31-42(a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Order of Death Not Established for Purposes of Distributing Slayer's Estate. — The clause in this section which deems the slayer to have predeceased the victim does not establish the order of death between the slayer and the victim for purposes of distributing the slayer's estate. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Does Not Authorize Victim's Participation in Estate. — The plain language of this section clearly bars the slayer from participating in the victim's estate; however, it does not authorize the victim to participate in the slayer's estate; that may or may not occur. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Merely Establishes Presumption to Exclude Slayer. — This section does not indulge the fiction that the slayer's date of death is other than the actual date of death, but merely establishes a presumption to exclude the slayer. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with § 31-42(a). Because of the conclusive presumption in subdivision (3) of this section that the slayer predeceased the testator, § 31-42(a), not § 31-42(c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Cited in State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

§ 31A-11. Insurance benefits.

(a) Insurance and annuity proceeds payable to the slayer:

(1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or

(2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent. If no alternate beneficiary is named, insurance and annuity proceeds shall be paid into the estate of the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this Chapter. (1961, c. 210, s. 1; 1989, c. 485, s. 3.)

Editor's Note. — Session Laws 1989, c. 485, s. 67 is a severability clause.

Effect of Amendments. — The 1989 amendment, effective June 28, 1989, added the last sentence of subdivision (a)(2).

§ 31A-12. Persons acquiring from slayer protected.

CASE NOTES

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Cited in In re Trogdon, 101 N.C. App. 323, 399 S.E.2d 396 (1991).

Chapter 31B.

Editor's Note. — The legislation and annotations affecting Chapter 31B have been included in a recently published replacement chapter.

Chapter 32.

Fiduciaries.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-2. Definition of terms.

CASE NOTES

Stated in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

ARTICLE 5.

Compensation.

§ 32-51. Counsel fees allowable to attorneys serving as fiduciaries.

CASE NOTES

Foreclosure Proceedings. — When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described in this section in connection with a foreclosure proceeding, counsel is entitled under § 45-21.20 to an award of attorney's fees as an "expense[] incurred with respect to the sale or proposed sale...." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Chapter 32A.

Powers of Attorney.

Article 3.

Health Care Powers of Attorney.

Sec.
32A-25. Statutory form health care power of attorney.

ARTICLE 3.

Health Care Powers of Attorney.

§ 32A-25. Statutory form health care power of attorney.

The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

"(Notice: This document gives the person you designate your health care agent broad powers to make health care decisions for you, including the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive. This power exists only as to those health care decisions for which you are unable to give informed consent.

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will have to use due care to act in your best interests and in accordance with this document. Because the powers granted by this document are broad and sweeping, you should discuss your wishes concerning life-sustaining procedures with your health care agent.

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.)

1. Designation of health care agent.

I, ..., being of sound mind, hereby appoint
Name: ....
Home Address: ....
Home Telephone Number ....Work Telephone Number .....
as my health care attorney-in-fact (herein referred to as my 'health care agent') to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: ....

Home Address: ....
Home Telephone Number .... Work Telephone Number ....

B. Name: ....
Home Address: ....
Home Telephone Number .... Work Telephone Number ....

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my death. This determination shall be made by the following physician or physicians (You may include here a designation of your choice, including your attending physician, or any other physician. You may also name two or more physicians, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.):

....
....
....
....

3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions on my behalf, including, but not limited to, the following:

A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.

B. To employ or discharge my health care providers.

C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution.

D. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.

E. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

F. To exercise any right I may have to make a disposition of any part or all of my body for medical purposes, to donate my organs, to authorize an autopsy, and to direct the disposition of my remains.

G. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

....

....

....

....

5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security.

6. Reliance of third parties on health care agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.
   A. I revoke any prior health care power of attorney.
   B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.
   C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.
   D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

.... (SEAL) ....
Signature of Principal Date

9. Signatures of Witnesses.

I hereby state that the Principal, ..., being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness: .... Date: ....

Witness: .... Date: ....

STATE OF NORTH CAROLINA

COUNTY OF ....

CERTIFICATE

I, ..., a Notary Public for .... County, North Carolina, hereby certify that .... appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that .... and ...., witnesses, appeared before me and swore that they witnessed .... sign the attached health care power of attorney, believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the .... day of ...., 19.....

....

Notary Public

My Commission Expires:

....

(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)

(1991, c. 639, s. 1; 1993, c. 523, s. 3.)

Editor's Note. — The section above is set out to correct typographical errors in the main pamphlet.

Chapter 33A.

North Carolina Uniform Transfers to Minors Act.

§ 33A-1. Definitions.

Legal Periodicals. — For note discussing the Uniform Transfers to Minors Act, see 66 N.C.L. Rev. 1349 (1988).

Chapter 34.

Veterans' Guardianship Act.

Sec.
34-2.1. Guardian's powers as to property; validation of prior acts.
34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.
34-13. (Effective October 1, 1994 — See editor's note) Investment of funds.
34-16. [Repealed.]

§ 34-2.1. Guardian's powers as to property; validation of prior acts.

Any guardian appointed under the provisions of this Chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A of the General Statutes, and the provisions of such Chapter concerning the custody, management and disposal of property shall apply in any case not provided for by this Chapter. All acts heretofore performed by guardians appointed under the provisions of this Chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this Chapter, if such acts were performed under and in conformity with the provisions of Chapter 35A of the General Statutes. (1955, c. 1272, s. 1; 1987, c. 550, s. 18.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A of the General Statutes, and the provisions of such Chapter" for "Chapter 33 or Chapter 35 of the General Statutes of North Carolina, as the case may be, and the provisions of such chapters" in the first sentence, and substituted "Chapter 35A of the General Statutes" for "Chapter 33 or Chapter 35 of the General Statutes of North Carolina, as the case may be" at the end of the last sentence.

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

It shall be unlawful for any person, other than a public guardian qualified under Article 11, Chapter 35A, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1; 1987, c. 550, s. 19.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Article 11, Chapter 35A" for "Article 6, Chapter 33" in the first sentence.

§ 34-13. (Effective October 1, 1994 — See editor's note) Investment of funds.

Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.

(2) State of North Carolina bonds issued since the year 1872.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under the seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, Chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) Any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(5) Repealed by Session Laws 1979, c. 467, s. 22.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9; 1979, c. 467, s. 22; 1993, c. 539, s. 401; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, punishable by a fine or imprisonment or both in the discretion of the court" at the end of the third paragraph.

§ 34-14.1. Payment of veterans' benefits to relatives.

CASE NOTES

Cited in Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 34-16: Repealed by Session Laws 1985, c. 589, s. 14, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1.

Determination of Incompetence.

Sec.
35A-1101. Definitions.
35A-1105. Petition before clerk.
35A-1109. Service of notice and petition.
35A-1114. Appointment of interim guardian.
35A-1116. Costs and fees.

SUBCHAPTER II. GUARDIAN AND WARD.

Article 5.

Appointment of Guardian for Incompetent Person.

35A-1211. Service of application, motions, and notices.

Article 6.

Appointment of Guardian for a Minor.

35A-1221. Application before clerk.
35A-1222. Service of application and notices.
35A-1224. Criteria for appointment of guardians.
35A-1227. Funds owed to minors.

Article 7.

Guardian's Bond.

35A-1230. Bond required before receiving property.
35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.
35A-1237. Relief of endangered sureties.

Article 9.

Powers and Duties of Guardian of the Estate.

35A-1251. Guardian's powers in administering incompetent ward's estate.
35A-1252. Guardian's powers in administering minor ward's estate.

Article 10.

Returns and Accounting.

Sec.
35A-1261. Inventory or account within three months.
35A-1262. Procedure to compel inventory or account.
35A-1263. [Repealed.]
35A-1263.1. Supplemental inventory.
35A-1265. Procedure to compel accounting.
35A-1266. Final account and discharge of guardian.
35A-1269. Commissions.

Article 13.

Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

35A-1295. Termination of guardianship.
35A-1296 through 35A-1300. [Reserved.]

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

Article 14.

Sale, Mortgage, Exchange or Lease of Ward's Estate.

35A-1301. Special proceedings to sell, exchange, mortgage, or lease.
35A-1304. [Repealed.]
35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.

Article 15.

Mortgage or Sale of Estates Held by the Entireties.

35A-1311. General law applicable; approved by judge.

Article 16.

Surplus Income and Advancements.

35A-1320. [Repealed.]

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

ARTICLE 1.

Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this Subchapter:

(1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.

(2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.

(3) "Clerk" means the clerk of superior court.

(4) "Designated agency" means the State or local human resources agency designated by the clerk in his order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.

(6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

(8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of his minority, lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.

(9) "Indigent" means that a person is unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.

(10) "Inebriety" means the condition of any person who habitually, whether continuously or periodically, indulges in the use of alcoholic beverages, narcotics, or drugs to such an extent as to stupefy his mind and render him incompetent to transact ordinary business with safety to his estate; or who renders himself, by reason of the use of alcoholic beverages, narcotics, or drugs, dangerous to person or property; or who, by the frequent use of alcoholic beverages, narcotics, or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life.

(11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a respondent who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to his physical well-being or to his estate.

(12) "Mental illness" means an illness that so lessens the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity".

(13) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.

(14) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(15) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.

(16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.

(17) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, in subdivision (11), deleted "of the person" following "guardian," substituted "risk of harm" for "danger," and added "or to his estate."

CASE NOTES

Chapter Sets Out Sole Procedure for Determining Incompetency. — Although § 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, that procedure was preempted on October 1, 1987, by the enactment of this Chapter, which sets forth the sole procedure for determining the incompetency of infants and adults. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

And Adjudication of Incompetency Must Be Within Perimeters of This Chapter. — The language of § 35A-1102 requires any adjudication of incompetency to take place within the perimeters of this Chapter, even if the person sought to be declared incompetent does not challenge the action. However, § 1A-1, Rule 17 still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

This Chapter has had a significant impact on § 1A-1, Rule 25(b), which discusses the continuation of an action when one party becomes incompetent. In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of § 1A-1, Rule 25(b) would be referral of the competency issue to the clerk of superior court for action under this Chapter. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

§ 35A-1102. Scope of law; exclusive procedure.

CASE NOTES

Chapter Sets Out Sole Procedure for Determining Incompetency. — Although § 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, that procedure was preempted on October 1, 1987, by the enactment of this Chapter, which sets forth the sole procedure for determining the incompetency of infants and adults. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

And Adjudication of Incompetency Must Be Within Perimeters of This Chapter. — The language of this section requires any adjudication of incompetency to take place within the perimeters of this Chapter, even if the person sought to be declared incompetent does not challenge the action. However, § 1A-1, Rule 17 still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

This Chapter has had a significant impact on § 1A-1, Rule 25(b), which discusses the continuation of an action when one party becomes incompetent. In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of § 1A-1, Rule 25(b) would be referral of the competency issue to the clerk of superior court for action under this Chapter. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

Adult Must Be Declared Incompetent. — The terms of a will may not create a guardianship for an adult heir who has not been declared incompetent through the provisions of Chapter 35A. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1103. Jurisdiction; venue.

CASE NOTES

Quoted in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human resources agency through its authorized representative. (1987, c. 550, s. 1; 1989, c. 473, s. 22.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, inserted "of an adult, or of a minor who is within six months of reaching majority."

CASE NOTES

Quoted in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1107. Right to counsel or guardian ad litem.

CASE NOTES

Quoted in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

§ 35A-1108. Issuance of notice.

CASE NOTES

Stated in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1109. Service of notice and petition.

Copies of the petition and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so without demanding his fees in advance. The petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. (1987, c. 550, s. 1; 1989, c. 473, s. 18.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, inserted "unless such person has accepted notice" in the third sentence; in the next to the last sentence inserted "or acceptance," and inserted "or certificate of acceptance of notice."

§ 35A-1112. Hearing on petition; adjudication order.

CASE NOTES

Burden of Proof. — Incompetency must be proven by clear, cogent, and convincing evidence. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1114. Appointment of interim guardian.

(a) At the time of or subsequent to the filing of a petition under this Article, the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian.

(b) The motion shall set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention;

b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion. The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on his counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or

(2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest,

the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote subsection (b); inserted "and other persons the clerk may designate" in the next to the last sentence of subsection (c); and rewrote subsections (d) and (e).

§ 35A-1115. Appeal from clerk's order.

CASE NOTES

Quoted in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1116. Costs and fees.

(a) Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:

(1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or

(2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).

(b) The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:

(1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;

(2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Human Resources;
(3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Human Resources, in the discretion of the court.

(c) Witness fees and the fees of court-appointed counsel or guardian ad litem shall be paid by:
(1) The respondent, if the respondent is adjudicated incompetent and is not indigent;
(2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;
(3) The Administrative Office of the Courts in all other cases. (1987, c. 550, s. 1; 1989, c. 473, s. 15.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, inserted "including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow" in the introductory language of subsection (a).

ARTICLE 2.

Appointment of Guardian.

§ 35A-1120. Appointment of guardian.

CASE NOTES

Quoted in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

ARTICLE 3.

Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

CASE NOTES

Limitation on Clerk's Authority. — This section does not give a clerk of the court the authority to enter an order modifying a previous order of incompetency. Thus, a clerk did not have jurisdiction under this section to reopen an incompetency proceeding, hold a rehearing, and enter an order modifying the previous order of incompetency. In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134 (1994).

Ward Entitled to Appeal. — Under this section, only a ward may appeal from a clerk's order. In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134 (1994).

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1207. Motions in the cause.

CASE NOTES

Chapter 35A contemplates a spousal support obligation. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Any interested person, including a spouse, may seek payment of an obligation from an incompetent's estate by filing a motion in the cause under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Incompetent's Spouse Is Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent has residual equitable power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to this section, or as a special proceeding for the sale of her husband's property under § 35A-1307. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The estate of an incompetent may not be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge; rather, in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

If the guardian questions the propriety of a particular charge against the estate, he may seek prior court approval before making payment by filing a motion in the cause with the superior court clerk. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Authority of Clerk Limited. — The clerk of court did not have the authority to base his reopening and subsequent rehearing of an adjudication of incompetency on this section or on the consent of the parties. In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134 (1994).

ARTICLE 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1211. Service of application, motions, and notices.

(a) Application for appointment of a guardian and related motions and notices shall be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk shall direct.

(b) When the application for appointment of a guardian is joined with a petition for adjudication of incompetence, the application shall be served with and in the same manner as the petition for adjudication of incompetence. When the application is filed subsequent to the petition for adjudication of incompetence, the applicant shall serve the application as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk directs otherwise. (1987, c. 550, s. 1; 1989, c. 473, s. 25.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "The respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons" for "the parties and on such other persons" in subsection (a); and rewrote subsection (b).

ARTICLE 6.

Appointment of Guardian for a Minor.

§ 35A-1221. Application before clerk.

Any person or corporation, including any State or local human resources agency through its authorized representative, may make application for the appointment of a guardian of the estate for any minor or for the appointment of a guardian of the person or general guardian for any minor who has no natural guardian by filing an application with the clerk. The application shall set forth, to the extent known:

(1) The minor's name, date of birth, address, and county of residence;

(2) The names and address of the minor's parents, if living, and of other persons known to have an interest in the application for appointment of a guardian; the name of and date of death of the minor's deceased parent or parents;

(3) The applicant's name, address, county of residence, relationship if any to the minor, and interest in the proceeding;

(4) If a guardian has been appointed for the minor or custody of the minor has been awarded, a statement of the facts relating thereto and a copy of any guardianship or custody order, if available;

(5) A general statement of the minor's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled;

(6) A statement of the reason or reasons that the appointment of a guardian is sought; whether the applicant seeks the

estate, or a general guardian; and whom the applicant recommends or seeks to have appointed as such guardian or guardians; and

(7) Any other information that will assist the clerk in determining the need for a guardian or in appointing a guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 24.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "Application" for "Petition" in the catchline.

§ 35A-1222. Service of application and notices.

A copy of the application and written notice of the time, date, and place set for a hearing shall be served on each parent, guardian, and legal custodian of the minor who is not an applicant, and on any other person the clerk may direct, including the minor. Service shall be provided by G.S. 1A-1, Rule 4, Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. (1987, c. 550, s. 1; 1989, c. 473, s. 19.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "each parent, guardian and legal custodian" for "any parent, guardian, or legal custodian"; and added the present second sentence.

§ 35A-1224. Criteria for appointment of guardians.

(a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.

(c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) If the minor's parent or parents have made a testamentary recommendation pursuant to G.S. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 1989 c. 473, s. 1.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "whether or not that individual" for "who" in subsections (b) and (c).

§ 35A-1225. Testamentary recommendation; guardian for incompetent minor.

CASE NOTES

Appointment by Will. — A last will and testament cannot operate to appoint a guardian for an adult child regardless of the disability. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

§ 35A-1227. Funds owed to minors.

(a) Certain insurance proceeds or other funds to which a minor is entitled may be paid to and administered by the public guardian or the clerk as provided in G.S. 7A-111.

(b) A devise or legacy of personal property to a minor may be distributed to the minor's parent or guardian with the approval of the clerk as provided in G.S. 28A-22-7.

(c) A personal representative or collector who holds property due a minor without a guardian may deliver the property to the clerk as provided in G.S. 28A-23-2.

(d) Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes. (1987, c. 550, s. 1; 1989, c. 473, s. 23.)

Effect of Amendments. — The 1989 amendment in subsection (d) substituted "transfers" for "gifts" in two places, and substituted "Chapter 33A" for "Chapter 33."

ARTICLE 7.

Guardian's Bond.

§ 35A-1230. Bond required before receiving property.

Except as otherwise provided by G.S. 35A-1225(a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars ($1,000) the surety shall be a bond under G.S. 35A-1231(a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond or by a mortgage executed under Chapter 109 of the General Statutes on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk shall not require a guardian of the person who is a resident of North Carolina to post a bond; the clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. (1987, c. 550, s. 1; 1989, c. 473, s. 2.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.

(a) Before issuing letters of appointment to a general guardian or guardian of the estate the clerk shall require the guardian to give a bond payable to the State. The clerk shall determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant for guardianship or any other person or persons. The penalty in the bond shall be set as follows:

(1) Where the bond is executed by personal sureties, the penalty must be at least double the value so determined by the clerk;

(2) Where the bond is executed by a duly authorized surety company, the penalty may be fixed at not less than one and one-fourth times the value so determined by the clerk;

(3) Provided, however, the clerk may accept bond in estates where the value determined by the clerk exceeds the sum of one hundred thousand dollars ($100,000), in a sum equal to one hundred and ten percent (110%) of the determined value.

The bond must be secured with two or more sufficient sureties, jointly and severally bound, and must be acknowledged before and approved by the clerk. The bond must be conditioned on the guardian's faithfully executing the trust reposed in him as such and obeying all lawful orders of the clerk or judge relating to the guardianship of the estate committed to him. The bond must be recorded in the office of the clerk appointing the guardian, except, if the guardianship is transferred to a different county, it must be recorded in the office of the clerk in the county where the guardianship is docketed.

(b) If the court orders a sale of the ward's real property, or if the guardian expects or offers to sell personal property that he knows or has reason to know has a value greater than the value used in determining the amount of the bond posted, the guardian shall, before receiving the proceeds of the sale, furnish bond or increase his existing bond to cover the proceeds if real estate is sold, or to cover the increased value if personal property is sold. The bond, or the increase in the existing bond, shall be twice the amount of the proceeds of any real property sold, or of the increased value of any personal property sold, except where the bond is executed by a duly authorized surety company, in which case the penalty of the bond need not exceed one and one-fourth times the amount of the real property sold or the increased value of the personal property sold. (1987, c. 550, s. 1; 1989, 473, s. 9.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, added "or personal property" in the catchline, and rewrote subsection (b).

§ 35A-1237. Relief of endangered sureties.

Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file a motion in the cause before the clerk where the guardianship is docketed, setting forth the circumstances of his case and demanding relief. The guardian shall have 10 days after service of the motion to answer the motion. If, upon the hearing, the clerk deems the surety entitled to relief, the clerk may order the guardian to give a new bond or to indemnify the surety against apprehended loss, or may remove the guardian from his trust. If the guardian fails to give a new bond or security to indemnify within a reasonable time when required to do so, the clerk must enter a peremptory order for his removal, and his authority as guardian shall cease. (1987, c. 550, s. 1; 1989, c. 473, s. 20.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "motion in the cause" for "complaint" in the first sentence; and substituted "have 10 days after service of the motion to answer the motion" for "be required to answer the complaint within 20 days after service of the summons" in the second sentence.

ARTICLE 9.

Powers and Duties of Guardian of the Estate.

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete such contracts, as the guardian determines to be in the ward's best interests, taking into

account any cause of action that might be maintained against the ward for failure to complete such contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.

(9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.

(10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.

(13) To pay from the ward's estate necessary expenses of administering the ward's estate.

(14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(15) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(17)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(19) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons. (1987, c. 550, s. 1; 1989, c. 473, ss. 3, 13.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote subdivision (17), and added subdivision (21).

CASE NOTES

Guardian Is Under Fiduciary Obligation to Manage Estate Reasonably and Prudently. — The guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest, and in all cases, the guardian's management of the estate will eventually be subject to judicial scrutiny. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Guardian Is Empowered to Make Expenditures Without Prior Court Approval Except When Property Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1252. Guardian's powers in administering minor ward's estate.

In the case of a minor ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(5) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(6) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(7) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(8) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(9) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal; provided, neither the existence of the estate nor the guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward.

(10) To pay from the ward's estate necessary expenses of administering the ward's estate.

(11) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(12) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(13) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan association; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(14)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(15) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(16) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(17) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 4.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote subdivision (14).

ARTICLE 10.

Returns and Accounting.

§ 35A-1261. Inventory or account within three months.

Every guardian, within three months after his appointment, shall file with the clerk an inventory or account, upon oath, of the estate of his ward; but the clerk may extend such time not exceeding six months, for good cause shown. (1987, c. 550, s. 1; 1989, c. 473, s. 26.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "Inventory or account" for "Return" in the catchline; substituted "file with" for "exhibit to"; and inserted "inventory or."

§ 35A-1262. Procedure to compel inventory or account.

(a) In cases of default to file the inventory or account required by G.S. 35A-1261, the clerk must issue an order requiring the guardian to file the inventory or account within the time specified in the order, or to show cause why he should not be removed from office or held in civil contempt, or both. If after due service of the order, the guardian does not, within the time specified in the order, file such inventory or account, or obtain further time to file the same, the clerk may remove him from office, hold him in civil contempt as provided in Article 2 of Chapter 5A, or both.

(b) The guardian shall be personally liable for the costs of any proceeding incident to his failure to file the inventory or account required by G.S. 35A-1261. Such costs shall be taxed against him by the clerk and may be collected by deduction from any commissions that may be found due the guardian upon final settlement of the estate. (1987, c. 550, s. 1; 1989, c. 473, s. 27.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1263: Repealed by Session Laws 1989, c. 473, s. 28, effective October 1, 1989.

§ 35A-1263.1. Supplemental inventory.

Whenever any property not included in the original inventory report becomes known to the guardian or whenever the guardian learns that the valuation or description of any property or interest therein indicated in the original inventory is erroneous or misleading, he shall prepare and file with the clerk a supplementary inventory in the same manner as prescribed for the original inventory. The clerk shall record the supplemental inventory with the original inventory. A guardian who fails to file a supplementary inventory as required by this section shall be subject to the enforcement provisions of G.S. 35A-1262. (1989, c. 473, s. 29.)

Editor's Note. — Session Laws 1989, c. 473, s. 33 made this section effective October 1, 1989.

§ 35A-1265. Procedure to compel accounting.

(a) If any guardian omits to account, as directed in G.S. 35A-1264, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such guardian to render a full and satisfactory account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if the guardian fails to appear or refuses to exhibit such account, the clerk may issue an attachment against him for contempt and commit him until he exhibits such account, and may likewise remove him from office. In all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceedings, including the costs of service of all notices or writs incidental to, or thereby acquiring, and also including reasonable attorney fees and expenses incurred by a successor guardian or other person in bringing any such proceeding, or other proceedings deemed reasonable and necessary to discover or obtain possession of assets of the ward in the possession of the defaulting guardian or which the defaulting guardian should have discovered or which the defaulting guardian should have turned over to the successor guardian. The amount of the costs and attorney fees and expenses of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate.

(b) Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for the corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of the corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may be fined and/or removed as such guardian for such failure or omission. (1987, c. 550, s. 1; 1989, c. 473, s. 16.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote subsection (a).

§ 35A-1266. Final account and discharge of guardian.

Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability. (1987, c. 550, s. 1; 1989, c. 473, s. 32.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1269. Commissions.

The clerk shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of G.S. 28A-23-3 and G.S. 28A-23-4. (1987, c. 550, s. 1; 1989, c. 473, s. 21.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "clerk" for "superior court"; and inserted "and G.S. 28A-23-4."

ARTICLE 13.

Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

§ 35A-1290. Removal by Clerk.

Editor's Note. — Session Laws 1989, c. 473, s. 30, effective October 1, 1989, substituted the present title of Article 13 for "Termination of Guardianship; Estates Without Guardians."

CASE NOTES

Editor's Note. — *The annotation in the main volume under this section, catchlined "Removal without Cause Is Error," relating to the case of Sanderson v. Sanderson, 79 N.C. 369 (1878), should be disregarded.*

Showing Required for Removal of Legal Guardian. — Subsection (b)(7) authorizes the removal of a guardian where there is a showing of any potential for conflict between the interests of the ward and those of the guardian. In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

The words "might tend" in subsection (b)(7) established a minimal showing of possible conflicting interest for the removal of a guardian. In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

§ 35A-1295. Termination of guardianship.

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:

(1) Ceases to be a minor as defined in G.S. 35A-1202(12),

(2) Is adjudicated to be restored to competency pursuant to the provisions of G.S. 35A-1130, or

(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk. (1989, c. 473, s. 31.)

Editor's Note. — Session Laws 1989, c. 473, s. 33 made this section effective October 1, 1989.

§§ 35A-1296 through 35A-1300: Reserved for future codification purposes.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

ARTICLE 14.

Sale, Mortgage, Exchange or Lease of Ward's Estate.

§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.

(a) Whenever used herein, the word "guardian" shall be construed to include general guardian, guardian of the estate, ancillary guardian, next friend, guardian ad litem, or commissioner of the court acting pursuant to this Article, but not a guardian who is guardian of the person only; and the word "mortgage" shall be construed to include deeds of trust.

(b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or

(2) The ward's personal estate has been exhausted or is insufficient for his support and the ward is likely to become chargeable on the county, or

(3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for his maintenance or for the discharge of debts unavoidably incurred for his maintenance, or

(4) Any part of the ward's real estate is required for public purposes, or

(5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale of only so much of the real estate as may be sufficient to discharge such debt or

demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

The order shall specify particularly the property thus to be disposed of, with the terms of leasing or sale or exchange or mortgage, and shall be entered at length on the records of the court. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its order.

(c) In the case of a ward who is a minor, no sale, mortgage, exchange, or lease under this Article shall be made until approved by the superior court judge, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale, mortgage, exchange, or lease shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

(d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

(e) The procedure for a sale pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes.

(f) Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases.

(g) On and after June 1, 1973, no sales of property belonging to minors or incompetent persons prior to that date by next friend, guardian ad litem, or commissioner of the court regular in all other respects shall be declared invalid nor shall any claim or defense be asserted on the grounds that said sale was not made by a duly appointed guardian as provided herein or on the grounds that said minor or incompetent person was not represented by a duly appointed guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 6.)

Editor's Note. —

Session Laws 1989, c. 473, s. 5, effective October 1, 1989, substituted "Lease" for "Rental" in the title for Article 14.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, in the catchline inserted "exchange," and substituted "lease" for "rent"; in subsection (b) in the introductory paragraph substituted "to sell" for "for the sale," substituted "lease for a term of more than three years" for "rental of," substituted "real estate" for "estate, real or personal," and substituted "lease" for "rental"; substituted "lease" for "rental" in subdivisions (b)(1) and (b)(3); deleted "or personal" preceding "estate" in subdivision (b)(3); deleted "personal or" preceding "real estate" in subdivision (b)(5); substituted "leasing" for "renting" in the first sentence of the last paragraph of subsection (b); substituted "lease under this Article" for "rental" in subsection (c); substituted "lease" for "rental" in subsections (c) and (d); and in subsection (d) deleted "or both real and personal property" following "real estate," and deleted the last sentence which read "If the order sought is for the sale, mortgage, exchange, or rental of the ward's personal estate, the petition shall be filed in the county in which any or all of such personal estate is situated."

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1304: Repealed by Session Laws 1989, c. 473, s. 7, effective October 1, 1989.

§ 35A-1306. Abandoned incompetent spouse.

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk to sell the real property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the superior court district or set of districts as defined in G.S. 7A-41.1 where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1987, c. 550, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 83; 1989, c. 473, s. 8.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "superior court district or set of districts as defined in G.S. 7A-41.1" for "judicial district" at the end of the first sentence.

The 1989 amendment, effective October 1, 1989, inserted "real" preceding "property" in the catchline and in the first sentence.

CASE NOTES

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Spouse Should Be Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent—has residual equitable power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to § 35A-1207, or as a special proceeding for the sale of her husband's property under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

ARTICLE 15.

Mortgage or Sale of Estates Held by the Entireties.

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk.

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1311. General law applicable; approved by judge.

The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6; 1987, c. 550, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 84.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1" for "the resident judge or the judge holding the courts in the judicial district."

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

ARTICLE 16.

Surplus Income and Advancements.

§ 35A-1320: Repealed by Session Laws 1989, c. 473, s. 14, effective October 1, 1989.

Chapter 36A.

Trusts and Trustees.

Article 4.

Charitable Trusts.

Sec.
36A-52. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

Article 4B.

North Carolina Community Trust Act.

36A-59.10. North Carolina Community Trust for Persons with Severe Chronic Disabilities; findings.
36A-59.11. Definitions.
36A-59.12. Scope.
36A-59.13. Administration; powers and duties.
36A-59.14. Accountability.
36A-59.15. Gifts, surplus trust funds.
36A-59.16. Special requests on behalf of beneficiary.
36A-59.17. Irrevocability; impossibility of fulfillment.
36A-59.18. Beneficiary's interest in trust not asset for income eligibility determination.
36A-59.19. Trust not subject to law against perpetuities, restraints on alienation.

Sec.
36A-59.20. Settlement; trustee limitations.
36A-59.21. [Repealed.]

Article 5.

Uniform Trusts Act.

36A-66.2. Trustee investment in mutual funds advised by trustee.

Article 12.

Marital Deduction Trusts.

36A-131 through 36A-134. [Reserved].

Article 13.

Powers of Trustees.

36A-135. Applicability.
36A-136. Powers of a trustee.
36A-137. Disposition of personal property without court order.
36A-138. Disposition of personal property by court order.
36A-139. Disposition of real property without court order.
36A-140. Disposition of real property by court order.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36A-1. Definition.

CASE NOTES

Stated in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

ARTICLE 4.

Charitable Trusts.

§ 36A-52. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

(a) Declaration of Policy. — It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to effect the policy herein declared.

(b) No Gift, Transfer, Etc., Invalid for Indefiniteness. — No gift, transfer, grant, bequest, or devise of property or income or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of affecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: To prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

(c) Enforcement. — Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the Attorney General of the State of North Carolina in any court of the State having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the General Assembly.

(d) Construction with Other Acts. — This section is in addition to any prior act or acts of the General Assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4; 1977, c. 502, s. 2; 1993, c. 553, s. 2.)

Effect of Amendments. — The 1993 amendment, effective July 24, 1993, in subsection (a) substituted "effect" for "affect."

CASE NOTES

Cited in In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

§ 36A-53. Charitable Trusts Administration Act.

CASE NOTES

Cited in Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

§ 36A-54. Charitable trusts tax exempt status.

CASE NOTES

Cited in In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

ARTICLE 4B.

North Carolina Community Trust Act.

§ 36A-59.10. North Carolina Community Trust for Persons with Severe Chronic Disabilities; findings.

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons with Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens which will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive his parents or other family members, and provide for the efficient management of small legacies or trust funds to be used for the benefit of such a disabled person. In a number of other states voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, pursuant to Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;
(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;
(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;
(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;
(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;
(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those which are not available from other sources;
(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and
(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program

with an economic means test. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 768, s. 2, made this article effective upon ratification. The act was ratified June 17, 1992.

§ 36A-59.11. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:
   a. Administration of special trust funds for persons with severe chronic disabilities;
   b. Follow along services;
   c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and
   d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, participation in the development of individualized plans being made by service providers for the beneficiary, and other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and which makes the person with such a disability dependent upon others for assistance to secure these services.

(5) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

(6) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary which, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.12. Scope.

This Article shall apply to every community trust established in this State. In addition to meeting the other requirements of this Article, every board which administers a community trust shall incorporate as a nonprofit corporation pursuant to Chapter 55A of the General Statutes. Except as otherwise provided herein, the provisions of Chapter 55A of the General Statutes shall apply to the community trusts. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.13. Administration; powers and duties.

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom shall be parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State pursuant to Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that title, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other provision of law to the contrary, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(b1) For every community trust incorporated under this Article, the corporation itself shall be considered the trustee of any funds administered by it. No individual board member shall be considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(c) The board shall adopt bylaws that shall include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided and shall file the bylaws with the Secretary of State.

(d) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services which, in its sole discretion, it determines will promote the well-being of any beneficiary, including recreational services. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(e) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(f) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, on request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(g) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(h) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.14. Accountability.

Along with the annual report filed with the Secretary of State pursuant to Chapter 55A of the General Statutes, the community trust shall file an itemized statement which shows the funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.15. Gifts, surplus trust funds.

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiaries any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.16. Special requests on behalf of beneficiary.

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.17. Irrevocability; impossibility of fulfillment.

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.18. Beneficiary's interest in trust not asset for income eligibility determination.

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust shall not be deemed to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.19. Trust not subject to law against perpetuities, restraints on alienation.

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.20. Settlement; trustee limitations.

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at any time prior to the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual shall be entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article. (1991 (Reg. Sess., 1992), c. 768, s. 1.)

§ 36A-59.21: Repealed by 1991 (Regular Session, 1992), c. 1044, s. 48(a), effective July 1, 1992.

ARTICLE 5.

Uniform Trusts Act.

§ 36A-60. Definitions.

CASE NOTES

Applicability. — The Uniform Trusts Act did not apply to case where executor exercised option to purchase land owned by estate; nothing in the language of the will expressly created a trust. Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499 (1994).

§ 36A-66. Trustee buying from or selling to self.

CASE NOTES

Cited in Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499 (1994).

§ 36A-66.2. Trustee investment in mutual funds advised by trustee.

(a) Unless prohibited or otherwise limited by an instrument governing a fiduciary relationship, a corporate trustee may invest in the securities of, or any other interest in, any open end or closed end management type investment company or investment trust registered under the "Investment Company Act of 1940", 15 U.S.C. § 80a-1 et seq., notwithstanding that the corporate trustee or affiliate of the corporate trustee provides services to the investment company or investment trust such as that of investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives or has received remuneration for those services; provided that the corporate trustee shall make such investment only if that investment is in the best interest of the beneficiary of the account. With respect to any funds so invested, the corporate trustee shall conspicuously disclose by statement, prospectus, or otherwise to all current income beneficiaries of an account the rate, formula, or other method by which the remuneration for those services is determined. This disclosure shall be in addition to such disclosure of any trustee fee charged by the corporate trustee with respect to said funds.

(b) Notwithstanding any other provision of this section, the total amount of all fees, charges, remuneration, and compensation derived from the trust assets by the corporate trustee, or its affiliate, or both, shall be reasonable. (1993, c. 126, s. 1.)

Editor's Note. — Session Laws 1993, c. 126, s. 1, made this section effective October 1, 1993.

§ 36A-78. Power of settlor.

CASE NOTES

Cited in Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499 (1994).

Article 12.

Marital Deduction Trusts.

§§ 36A-131 through 36A-134: Reserved for future codification purposes.

Article 13.

Powers of Trustees.

§ 36A-135. Applicability.

(a) This Article applies only to trustees under express trust agreements, including testamentary trusts, whether the trustee is appointed under an express trust agreement or appointed by the clerk of superior court. This Article does not apply to trustees of:

(1) Resulting or constructive trusts;
(2) Business trusts that provide for certificates to be issued to the beneficiary;
(3) Investment trusts;
(4) Voting trusts;
(5) Security instruments;
(6) Trusts created by the judgment or decree of a court;
(7) Liquidation trusts;
(8) Trusts created for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind;

(9) Instruments in which a person is nominee or escrowee for another;
(10) Trusts created in deposits in any financial institution; or
(11) Any other trust the nature of which does not allow for general trust administration.

A trustee shall have all the powers and duties under this Article to the extent that such powers and duties are not inconsistent with the powers and duties imposed in the express trust. The powers and duties of more than one trustee are subject to the provisions of G.S. 36A-73.

(b) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any express trust agreement creating or limiting the trustee's powers and duties.

(c) The powers contained in this Article are in addition to any other powers granted or provided by law. (1993, c. 377, s. 1.)

Editor's Note. — Session Laws 1993, c. 377, s. 4 made this Article effective December 1, 1993, and applicable to all trusts in existence on December 1, 1993 or created on or after December 1, 1993.

§ 36A-136. Powers of a trustee.

A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust estate to accomplish the desired result of administering the trust estate legally and in the best interest of the trust beneficiaries, including the following specific powers:

(1) To take possession, custody, or control of assets transferred to the trust.
(2) To retain for such time as the trustee shall deem advisable any property, real or personal, which the trustee may receive, even though the retention of such property by reason of its character, amount, or proportion to the total estate, or for any other reason, would not be appropriate for the trustee apart from this provision.
(3) To receive assets from other fiduciaries or other sources.
(4) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.
(5) To make, execute, and deliver all instruments, under seal or otherwise, as may be necessary in the exercise of the powers granted in this section.
(6) To abandon or relinquish all rights in any property when, in the trustee's opinion, acting reasonably and in good faith, the property is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the trust.
(7) To sell, exchange or otherwise dispose of, or grant options with respect to, any personal property of the trust in the manner prescribed by G.S. 36A-137 and G.S. 36A-138.
(8) To sell, exchange, partition, or otherwise dispose of, or grant options with respect to, any real property of the trust in the manner prescribed by G.S. 36A-139 and G.S. 36A-140, provided that if the terms of an express trust

grant the trustee the power to sell, exchange, partition, or otherwise dispose of, or grant options with respect to, any real property, the powers contained in the express trust shall control, and the provisions of G.S. 36A-139 and G.S. 36A-140 shall not apply.

(9) To comply with environmental law:

a. To inspect property held by the trustee, including interests in sole proprietorships, partnerships, or corporations, and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to any actual or threatened violation of any environmental law affecting the property held by the trustee;

b. To take any action necessary, on behalf of the estate or trust, to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the trustee, either before or after the initiation of an enforcement action by any governmental body;

c. To refuse to accept property in trust if the trustee determines that the property to be donated to the trust either is contaminated by a hazardous substance or is being used for an activity directly or indirectly involving a hazardous substance that could result in liability to the trust or otherwise impair the value of the assets held by the trust;

d. To settle or compromise at any time any and all claims against the trust that may be asserted by a governmental body or private party involving the alleged violation of any environmental law affecting the property held in trust;

e. To disclaim any power granted by a document, statute, or rule of law that, in the sole discretion of the trustee, may cause the trustee to incur personal liability under any environmental law; or

f. To decline to serve as a trustee if the trustee reasonably believes that there is or may be a conflict of interest between the trustee in his fiduciary capacity and the trustee in his individual capacity because of potential claims or liabilities that may be asserted against the trustee on behalf of the trust because of the type or condition of assets held by the trust.

For purposes of this subdivision, the term "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this subdivision, the term "hazardous substance" means any substance defined as hazardous or toxic or otherwise regulated by environmental law. The trustee shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized by this subdivision against the income or principal of the trust. A trustee shall not be personally liable to any beneficiary or other party for a decrease in value of assets in trust by reason of the trustee's compliance with any environmental law, specifically including reporting requirements under such law. Neither the acceptance by the trustee of property or a failure by the trustee to inspect property creates any inference as to whether or not there is or may be liability under any environmental law with respect to such property.

(10) To sell or exercise stock subscription or conversion rights, or to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporate or other business enterprise.

(11) To insure the trust's assets against damage or loss, at the expense of the trust.

(12) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the trust property.

(13) To pay necessary expenses of administering the trust from the trust property.

(14) To employ persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists to advise or assist the trustee in the performance of the trustee's administrative duties, and to charge the expense of such employment to the trust.

(15) To continue any business, venture, or farming operation in which the trust has an interest, when such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the trust's interest in such business.

(16) To incorporate, or participate in the incorporation of, any business or venture in which the trust may have an interest.

(17) To invest and reinvest trust property as the trustee deems advisable in accordance with the provisions of the trust or as provided by law.

(18) To lease any property of the trust for a term of not more than three years.

(19) To foreclose, as an incident to the collection of any bond, note, or other obligation, any mortgage, deed of trust, or other lien securing such bond, note, or other obligation, and to bid on the property at the foreclosure sale, or to acquire the property from the mortgagor or obligor without foreclosure, and to retain the property so bid on or taken over without foreclosure.

(20) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the trustee deems advisable, including the power of a corporate trustee to borrow from the trustee's own banking department, for the sole purpose of paying debts, taxes, and other claims against the trust property as may be required to secure such loan or loans, and to renew existing loans either as to make or endorser.

(21) To allocate items of income or expense to either trust income or principal, as permitted or provided by law.

(22) To make payments of money, or of property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

a. To such minor or incompetent directly;
b. To any person or institution providing support, maintenance, education, or medical, surgical, hospital, or other institutional care of such minor or incompetent in direct payment for those services;
c. To the legal or natural guardian of such minor or incompetent;
d. To any person, whether or not appointed guardian of the person by any court, who shall in fact have the care and custody of the person of such minor or incompetent;
e. To a custodian for such beneficiary under a uniform gifts or transfers to minors act.

The fiduciary shall not be under any duty to see the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made. The receipt by such person shall be full acquittance to the fiduciary.

(23) To deposit, as a trustee, funds of the trust in a bank, including a bank operated by the trustee upon compliance with the provisions of G.S. 36A-63. (1993, c. 377, s. 1.)

§ 36A-137. Disposition of personal property without court order.

Pursuant to the authority contained in G.S. 36A-136(7), the trustee has the power to sell at either a public or private sale, or to exchange or otherwise dispose of, or grant options with respect to, personal property of the trust without court order. (1993, c. 377, s. 1.)

§ 36A-138. Disposition of personal property by court order.

(a) A trustee may request the clerk of superior court to issue to him an order to sell, exchange, or otherwise dispose of, or grant options with respect to, personal property of the trust.

(b) Sales of personal property shall be conducted as provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales". (1993, c. 377, s. 1.)

Editor's Note. — Article 29A of Chapter 1, referred to above, may be found at § 1-339.1 et seq.

§ 36A-139. Disposition of real property without court order.

Pursuant to the authority contained in G.S. 36A-136(8), the trustee has the power to sell, exchange, partition, or otherwise dispose of, or grant options with respect to, real property of the trust upon such terms as he may deem just and for the advantage of the trust. The procedure shall be as provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales." If the clerk of superior court is petitioned and provided with satisfactory proof that the best interest of the estate will be served by private sale, the clerk may authorize a private sale in accordance with the provisions of G.S.1-339.33 through G.S.1-339.40. (1993, c. 377, s. 1.)

Editor's Note. — Article 29A of Chapter 1, referred to above, may be found at § 1-339.1 et seq.

§ 36A-140. Disposition of real property by court order.

(a) A trustee may request the clerk of superior court to issue to him an order to sell, exchange, partition, or otherwise dispose of, or grant options with respect to, real property of the trust.

(b) Sales of real property shall be conducted as provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales." (1993, c. 377, s. 1.)

Editor's Note. — Article 29A of Chapter 1, referred to above, may be found at § 1-339.1 et seq.

Chapter 36B.

Uniform Management of Institutional Funds Act.

Sec.
36B-1. Definitions.

§ 36B-1. Definitions.

As used in this Chapter, the following terms have the meanings specified:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution, unless the fund is held exclusively for the benefit of either a community foundation or community trust, deemed to be "publicly supported" under the Code, as defined in G.S.105-134.1(*l*), and held by:

a. A bank;

b. A trust company; or

c. Another fiduciary

that is a trustee of the community foundation or community trust or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund or (iii) funds other than endowment funds held by a governmental organization;

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, trust, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. (1985, c. 98, s. 1; 1991, c. 39, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, rewrote subdivision (2).

Chapter 37.

Allocation of Principal and Income.

Article 2.

Principal and Income Act of 1973.

Sec.
37-17. Definitions.
37-21. Income earned and expenses incurred during administration of a decedent's estate or a living trust.

Sec.
37-21.1. Interest on pecuniary bequests.
37-30. Taxes.
37-31. Compensation of trustee.
37-33. Management of principal and application of income.
37-35. Premiums on insurance.

ARTICLE 2.

Principal and Income Act of 1973.

§ 37-16. Short title.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-17. Definitions.

As used in this Article:

(1) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(2) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

(2a) "Living trust" means a trust created during the lifetime of the grantor that can be amended or revoked in its entirety by the grantor, which is fully includable in the grantor's gross estate for federal estate tax purposes upon the grantor's death, and which is used for the disposition of all or part of the grantor's estate at the grantor's death to beneficiaries designated in the trust instrument or to further trusts created under the trust instrument.

(2b) "Pecuniary bequest" means either (i) a bequest of a specific sum of money directed under a will, or (ii) a distribution or allocation, either outright or in trust, of a specific sum of money directed under a trust instrument to be made upon the death of the grantor of the trust, upon the death of any beneficiary of the trust, or upon the happening of any other contingency. A "pecuniary bequest" includes sums determined under a mathematical formula contained in the will or governing trust instrument and sums which can be satisfied by a distribution in kind in lieu of a distribution of money.

(3) "Personal representative" shall include executor, any successor executor, administrator of intestate estates, administrator c.t.a., successor administrator, collector, or any fiduciary appointed to administer or conserve an estate.

(4) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal.

(5) "Trustee" means an original trustee and any successor or added trustee and, where applicable, the personal representative of a decedent's estate.

(6) "Trust" includes, where applicable, a decedent's estate whether testate or intestate.

(7) "Tax" includes any interest or penalty thereon except where such interest or penalty is separately provided for in this Article. (1973, c. 729, s. 2; 1993, c. 284, s. 1.)

Editor's Note. — The definitions in the section above have been set out in alphabetical order at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable to trusts in existence on that date or established on or after that date and to tax years of decedents' estates beginning on or after that date, deleted "(a)" preceding "As used in this Article:" and inserted the definitions of "pecuniary bequest" and "living trust."

§ 37-18. Duty of trustee or personal representative as to receipts and expenditures.

CASE NOTES

Quoted in Trustees of L.C. Wagner Trust v. Barium Springs Home for Children, Inc., 102 N.C. App. 136, 401 S.E.2d 807 (1991).

§ 37-19. Income; principal; charges.

CASE NOTES

Quoted in Trustees of L.C. Wagner Trust v. Barium Springs Home for Children, Inc., 102 N.C. App. 136, 401 S.E.2d 807 (1991).

§ 37-21. Income earned and expenses incurred during administration of a decedent's estate or a living trust.

(a) Unless the will or trust instrument otherwise provides or the court otherwise directs:

(1) All expenses incurred in connection with the administration and settlement of a decedent's estate or in connection with the administration and settlement of a living trust following the grantor's death and prior to the distribution of the trust property to the beneficiaries or to further trusts entitled to succeed to the property after the grantor's death (other than expenses of management and operation of the estate or trust property), including debts, funeral and burial expenses, death taxes, penalties concerning

death taxes, and family allowances, shall be charged against the principal of the estate or the living trust; and

(2) Compensation of attorneys, trustees, and personal representatives and court costs, to the extent they are incurred in the administration and settlement of a decedent's estate or of a decedent's living trust (following the death of the grantor of the trust and prior to distribution of the trust property to the beneficiaries or to further trusts entitled to succeed to the property after the grantor's death), shall be charged against the principal of the estate or the living trust; and

(3) All expenses incurred in the management and operation of a decedent's estate or living trust shall be charged against principal or income of the estate or living trust in accordance with the rules applicable to a trustee under the succeeding provisions of this Article.

(b) Unless the will or trust instrument otherwise provides, or the court otherwise directs, income from the assets of a decedent's estate or living trust after the death of the decedent and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under this Chapter and distributed as follows:

(1) To specific legatees, devisees, and distributees the income from the property bequeathed, devised, or directed to be distributed to them respectively, less taxes, ordinary repairs and other expenses of management and operation of the property, and appropriate portions of interest expense accrued since the death of the decedent and taxes imposed on income (excluding taxes chargeable against principal) which accrue during the period of administration of the decedent's estate or living trust;

(1a) To all legatees or distributees of pecuniary bequests, other than pecuniary bequests:

a. To or for the benefit of the decedent's surviving spouse that are or can be qualified for the federal estate tax marital deduction; or

b. To or for the benefit of charitable organizations that are qualified for the federal estate tax charitable deduction, including a charitable remainder trust,

as provided in G.S. 37-21.1;

(2) To all other legatees, devisees, and distributees and to all takers by intestacy, the balance of the income, less the balance of taxes, ordinary repairs and other expenses of management and operation of all property from which the estate or living trust is entitled to income, interest expense accrued since the death of the decedent and taxes imposed on income (excluding taxes chargeable against principal) which accrue during the period of administration of the estate or living trust, in proportion to their respective interests in the undistributed assets of the estate or living trust computed at times of distribution on the basis of federal estate tax value.

(c) Income received under subsection (b) by a trustee shall be treated as income of the trust. (1973, c. 729, s. 2; 1975, c. 19, s. 13; 1993, c. 284, s. 2.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable to trusts in existence on that date or established on or after that date and to tax years of decedents' estates beginning on or after that date, substituted "estate or a living trust" for "estate" in the section catchline and rewrote subsections (a) and (b).

§ 37-21.1. Interest on pecuniary bequests.

Unless the will or trust instrument otherwise provides, or the court otherwise directs, interest on pecuniary bequests, other than pecuniary bequests:

(1) To or for the benefit of a decedent's surviving spouse which are or can be qualified for the federal estate tax marital deduction; or

(2) To or for the benefit of charitable organizations which are qualified for the federal estate tax charitable deduction, including a charitable remainder trust,

shall be computed as provided in G.S. 24-1 and shall begin to accrue on the date that is one year following either the date of death of the person whose death gives rise to the payment of the pecuniary bequest, or the happening of any other contingency which gives rise to the payment of the pecuniary bequest. (1993, c. 284, s. 3.)

Editor's Note. — Session Laws 1993, c. 284, s. 3, made this section effective January 1, 1994, and applicable to trusts in existence on that date or established on or after that date and to tax years of decedents' estates beginning on or after that date.

§ 37-30. Taxes.

(a) Except as provided in subsection (d) of this section, regularly recurring taxes assessed against any portion of the principal and any tax levied on receipts defined as income under this Article or the trust instrument shall be charged against income.

(b) Any tax levied upon profits, gains or receipts allocated to principal shall be charged against principal notwithstanding denomination of the tax as an income tax by the taxing authority.

(c) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust shall be charged against principal even though the income beneficiary also has rights in the principal.

(d) One-half of ad valorem taxes and intangibles taxes shall be charged against income, and one-half of such taxes shall be charged against principal. (1973, c. 729, s. 2; 1993, c. 284, s. 4.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable only to trusts established on or after that date, substituted "Except as provided in subsection (d) of this section, regularly" for "regularly" in subsection (a) and added subsection (d).

§ 37-31. Compensation of trustee.

(a) Unless the court otherwise directs, one half of the regular compensation of the trustee, whether based on a percentage of principal or income, shall be charged against income, and one half of such compensation shall be charged against principal.

(b) Unless the court otherwise directs, compensation of the trustee other than regular compensation shall be charged against principal, including compensation relating to environmental remediation; provided that if the matter relates only to the income interest, the compensation shall be charged to income. Compensation computed on principal as an acceptance, distribution or termination fee shall be charged against principal. (1973, c. 729, s. 2; 1993, c. 284, s. 5.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable only to trusts established on or after that date, rewrote subsection (b).

§ 37-33. Management of principal and application of income.

One-half of all expenses reasonably incurred for current management of principal shall be charged against income, and one-half of such expenses shall be charged against principal; except that the direct costs of investing and reinvesting principal shall be charged against principal. (1973, c. 729, s. 2; 1993, c. 284, s. 6.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable only to trusts established on or after that date, substituted "One-half of all" for "All", deleted "and application of income" following "management of principal", and substituted "income, and one-half of such expenses shall be charged against principal;" for "income;".

§ 37-35. Premiums on insurance.

Premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee shall be charged against income, except that premiums for surety bonds shall be charged one-half against income and one-half against principal. (1973, c. 729, s. 2; 1993, c. 284, s. 7.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable only to trusts established on or after that date, substituted "income, except that premiums for surety bonds shall be charged one-half against income and one-half against principal" for "income."

§ 37-40. Application of Article.

CASE NOTES

Cited in Trustees of L.C. Wagner Trust v. Barium Springs Home for Children, Inc., 102 N.C. App. 136, 401 S.E.2d 807 (1991).

Chapter 38.
Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Only Question Is Location of True Dividing Line. — Where the only issue to be determined is the location of a dividing line between two parcels of land, the appropriate action is a processioning proceeding as provided by this section; however, in the event title to the land is put in issue, the Clerk may not hear the case, but must transfer it to the Superior Court where it becomes, in effect, an action to quiet title pursuant to § 41-10. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to § 41-10. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter, "the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985).

Cited in Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

§ 38-3. Procedure.

CASE NOTES

Parties to Proceeding. — All landowners whose land adjoins the disputed boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, although they may be joined in the discretion of the trial judge. Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Failure to Comply with Subsection (c) Not Fatal. — Trial court correctly found that the prior judgment was res judicata as to the location of boundary line despite the fact the court did not issue an order to the surveyor to run and mark the boundary lines; although the trial court may not have totally complied with this section, the court strictly observed the statutory provisions in all material respects. Tindall v. Willis, 95 N.C. App. 374, 382 S.E.2d 778 (1989).

Cited in Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the pertinent statute, does not require the court to do so. Young v. Young, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Chapter 39.

Conveyances.

Article 8.

Business Trusts.

Sec.
39-48, 39-49. [Reserved.]

Article 9.

Disclosure.

Sec.
39-50. Death or illness of previous occupant.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Conflicting Clauses.

I. GENERAL CONSIDERATION.

Cited in Atlas Fire Apparatus, Inc. v. Beaver, 56 Bankr. 927 (Bankr. E.D.N.C. 1986); International Paper Co. v. Hufhum, 81 N.C. App. 606, 345 S.E.2d 231 (1986).

II. CONFLICTING CLAUSES.

Conflict Between Granting Clause and Habendum. —

In event of any repugnancy between granting clause and preceding or succeeding recitals, granting clause will prevail. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Legal Periodicals. —

For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Legislative Intent. —

When the legislature passed this section, it was their primary intention to abolish past rules of construction which required courts to disregard certain clauses if they contradicted the granting clause of a deed. Instead, for conveyances executed after 1 January 1968, the courts would, under this section, consider equally all clauses in a deed when as the intent of parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Construction of Conveyances Executed Prior to January 1, 1968. —

Deeds executed prior to January 1, 1968, are to be construed according to common law rules, as opposed to the statutory rule of construction found in subsection (a) of this section. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573, cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Deed is to be construed by the court, and meaning of its terms is question of law, not of fact. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

The meaning of the terms of the deed is a question of law, not of fact. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Intent of Parties to Be Determined by Judge. — In light of the purpose of subsection (a) of this section, the statute's requirement that "the courts" interpret the deed did not change the traditional rule that it is the judge's role to determine the intent of the parties. It was not the legislature's intent to change *who* interprets the intent of the parties in a deed; rather, the statute was an effort by the legislature to state *how* "the courts" should interpret the deed. Therefore, under the statute it is the judge's role to determine the intent of the parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Court Has Power to Determine Intent But Not Issues of Fact. — Generally, where there is no waiver of jury trial or agreement as to facts nor evidence offered, the court is without power to decide a controverted issue of fact raised by the pleadings. However, ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Ascertaining Intent of Parties. — In some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. Intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time; the tendency of the modern decisions is to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining, in the manner indicated the intention of the parties; where trial judge chose not to hear evidence of "circumstances attending the execution of the instrument and the situation of the parties at that time," and instead, reasoned that he was able to determine the intent of the parties by considering the entire deed, summary judgment was proper. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Deed is to be construed to ascertain intention of grantor as expressed in language used, construed from four corners of instrument. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Repugnant to Granting Clause. — Introductory recital that defendants claimed created tenancy by entirety was repugnant to granting clause and had to be disregarded. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Was Not Given Effect Over Granting Habendum and Warranty Clauses. — Introductory recital, by virtue of being first in deed, not given effect over granting habendum and warranty clauses which were in accord with each other but inconsistent with introductory recital. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Jury Trial Held Unnecessary. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary. The judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

§ 39-2. Vagueness of description not to invalidate.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Contingent future interests are subject to execution by a judgment creditor of a remainderman. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987), overruling Watson v. Dodd, 68 N.C. 528 (1873), and Bourne v. Farrar, 180 N.C. 135, 104 S.E. 170 (1920), to the extent that they are inconsistent with this holding.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

CASE NOTES

What Deeds Are Cured under Subsection (a). — The plain language of subsection (a) of this section purports to cure deeds which are void because of failure to conduct a private examination of the wife. Subsection (a) does not purport to cure, and does not in fact cure, deeds which are void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her," as required under former §§ 47-39 and 52-12. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

This section would not validate a deed which failed to comply with former § 52-12; even if this section would operate to validate the deed for failure of the certifying officer to conduct a private examination, the deed would still be invalid because the certifying officer failed to find whether or not the deed was unreasonable or injurious to the wife. Dunn v. Pate, 98 N.C. App. 351, 390 S.E.2d 712, appeal dismissed and cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

§ 39-13.3. Conveyances between husband and wife.

CASE NOTES

Property Not Removed from Equitable Distribution Act by Dissolution of Tenancy by Entirety. — Though conveyances from wife to husband dissolved the tenancy by the entirety in the parcels of land and vested title thereto solely in husband, as § 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired, so the General Assembly has declared, is ipso facto marital property. Thus, contrary to husband's contention, dissolving the tenancy by the entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

CASE NOTES

Cited in Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

§ 39-13.6. Control of real property held in tenancy by the entirety.

Legal Periodicals. —

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For note on the retroactive application of § 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Applicability to tenancies by the entireties which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The General Assembly has clearly manifested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988), rev'd on other grounds, 325 N.C. 428, 383 S.E.2d 656 (1989).

Attribution of Income for Child Support Purposes. — Although under the Child Support Guidelines income from rental property is included in the calculation of a parent's gross income, because father and his wife owned property in tenancy by the entirety, he was considered to have received only one-half of the income, or $487.50 per month; it was therefore error for the trial court to attribute the full amount of rental income from the property to father. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Cited in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

CASE NOTES

I. General Consideration.
II. What Conveyances Fraudulent.
  A. In General.
  B. Intent.
III. Rights and Liabilities of Parties and Purchasers.

I. GENERAL CONSIDERATION.

The case of Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914), is the cornerstone of the North Carolina fraudulent conveyance law. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

It Applies Only to Conveyances, etc. —
In accord with the main volume. See Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

For discussion of what constitutes valuable consideration under this section, see North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984).

Question for Jury. — Whether a conveyance, whatever its form, was in substance and fact a conveyance by the debtor-bankrupt, or by another such as a pledgee, is a jury question. Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

Applied in Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984).

Cited in Moffett v. Daniels, 80 N.C. App. 516, 342 S.E.2d 925 (1986).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated. —
In accord with the main volume. See Wilkinson v. United States, 741 F. Supp. 577 (W.D.N.C. 1990).

Conveyance to Wife or to Wife and Self by Entireties. — Complaint brought by individual who succeeded to the rights of existing creditor by virtue of bond and payment thereunder, alleging that while unable to pay a claim that had been pending against him for two years and while he had no other assets with which to pay his creditors, defendant husband gratuitously conveyed his solely owned real property to himself and defendant wife by the entireties and gratuitously had title to other land that he purchased later put in her name stated a claim for relief against defendant wife, as if the alleged circumstances were established the conveyances would be invalid to existing creditors as a matter of law. Nye v. Oates, 96 N.C. App. 343, 385 S.E.2d 529 (1989).

Conveyance Following Separation Agreement. — Despite contention of creditor of husband that separation agreement executed by husband and wife destroyed tenancy by the entirety and vested a property interest in husband against which creditor was entitled to levy, where husband and wife were not divorced until over 8 months following the conveyance of the marital property to husband's parents, the property remained entirety property at the time of the conveyance, and could not be the subject of a conveyance in defraud of husband's individual creditors. The trial court erred in ordering that creditor was entitled to receive the proceeds of the sale of this property. Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

B. Intent.

Consideration for the conveyance was another circumstance from which the jury inferred fraudulent intent; although defendants contended that there was valuable consideration in that grantee agreed to assume defendants' indebtedness to a third party in the amount of $93,000 grantee was not making regular payments on the note and the noteholder, who was related to the individual defendants, was allowing grantee to pay off the debt by doing work for him. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence Held Sufficient to Show Intent. — There was sufficient evidence to support the jury's finding that conveyance was made with the actual intent to defraud plaintiff where plaintiff's evidence showed that defendants owed several debts to plaintiff which they were unable to pay and that plaintiff attempted to collect a $5,000 account balance shortly before the conveyance occurred. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Grantee Must Be Purchaser for Value to Be Protected. — North Carolina law protects bona fide purchasers from creditors of the grantor. In order to be protected a grantee must first be a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Deed of trust to secure a present loan constitutes the beneficiary a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

CASE NOTES

I. General Consideration.
II. Pleading and Practice.

I. GENERAL CONSIDERATION.

When Conveyance May Be Set Aside as Fraudulent. — Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and reasonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor did not retain sufficient property to satisfy his then existing debts. Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Corporation Sold Subject to Its Corporate Debt. — A corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

When a corporation purchases all or substantially all of the assets of another corporation for grossly inadequate consideration, the transfer will be deemed fraudulent as to the selling corporation's creditors, regardless of whether the parties had the actual intent to defraud. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Good will is an asset capable of being fraudulently conveyed, and where the good will is put beyond reach of creditors, equity will allow a money damage award equal to the value of the good will. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Applied in Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Havee v. Belk, 589 F. Supp. 600 (W.D.N.C. 1984).

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

II. PLEADING AND PRACTICE.

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

§ 39-18. Marriage settlements void as to existing creditors.

Legal Periodicals. —
For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

CASE NOTES

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.

CASE NOTES

Controlling Effect of § 1-69.1. — This section was enacted in 1939. The amendment to § 1-69.1, which added the requirement of an allegation of § 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, § 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of § 1-69.1 are mandatory and failure to satisfy them is not exonerated by this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

§ 39-25. Title vested; conveyance; probate.

CASE NOTES

Unincorporated, Unregistered Association May Hold Property in Its Common Name. — Under the wording of this section, unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with § 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirement That Unincorporated Association Allege Registration. — While it is true that § 1-69.1 requires unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-37. Short title.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 39-38. Uniformity of interpretation.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-39. Risk of loss.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Risk of Loss Not Shifted to High Bidder Prior to Closing. — Under this Act the making of the high bid in a foreclosure sale does not operate to extinguish the seller's interests and shift all risks to the purchaser. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the mortgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

ARTICLE 8.

Business Trusts.

§§ 39-48, 39-49: Reserved for future codification purposes.

ARTICLE 9.

Disclosure.

§ 39-50. Death or illness of previous occupant.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property; provided, however, that no seller may knowingly make a false statement regarding such past occupancy. (1989, c. 592, s. 1.)

Editor's Note. — Session Laws 1989, c. 592, s. 3 made this Article effective July 1, 1989, and applicable to acts or omissions occurring on or after July 1, 1989.

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.
40A-3. By whom right may be exercised.

Article 3.

Condemnation by Public Condemnors.

40A-42. Vesting of title and right of possession; injunction not precluded.

Article 5.

Return of Condemned Property.

40A-70. Return of condemned property.

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Conover: 1985, c. 422; city of Hickory: 1985, c. 422; city of Rocky Mount: 1989, c. 328, s. 1; city of Wilson: 1989, c. 348, s. 1; city of Winston-Salem: 1985, c. 47; 1987, c. 95; town of Apex: 1987, c. 70; town of Maiden: 1985, c. 422. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in § 40A-3, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Municipal Annexation Proceedings Enjoined by Condemnor-County. — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Applied in Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17 (1985).

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

§ 40A-2. Definitions.

CASE NOTES

Definition of "property" is broad enough to include profits à prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condemnation. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Cited in VEPCO v. Tillett, 316 N.C. App. 73, 343 S.E.2d 188 (1986).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

a. Not be less than 50 feet nor more than 100 feet in width; and

b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162A-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951,

c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1.)

Local Modification. — Guilford: 1987, c. 669, s. 3; Iredell: 1985, c. 570, s. 25; Stanly: 1985, c. 433, s. 2; 1989 (Reg. Sess., 1990), c. 839; Wake: 1985, c. 640, s. 1; 1993, c. 137, s. 2; Winston-Salem/Forsyth County Utility Commission: 1989 (Reg. Sess., 1990), c. 849; city of Asheville: 1985, c. 556, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 3; city of Morganton: 1987, c. 265, s. 1; city of Monroe: 1985, c. 177; city of Raleigh: 1985, c. 556, s. 2; city of Statesville: 1985, c. 570, s. 25; 1987, c. 265, s. 1; town of Carrboro: 1987, c. 476, s. 1; town of Cary: 1993, c. 137, s. 2; town of Wrightsville Beach: 1993, c. 187, s. 1; Grandfather Village: 1987, c. 419, s. 1; village of Pinehurst: 1985, c. 379, s. 2.

Cross References. — As to requirement for consent of board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

Effect of Amendments. —

The 1985 amendment by c. 689, s. 10, effective July 11, 1985, substituted "Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part" for "Article 12 of Chapter 130 for the purpose stated in that Article" at the end of subdivision (c)(1), substituted "Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part" for "Article 24 of Chapter 130 for the purposes stated in that Article" at the end of subdivision (c)(2), substituted "Part B of Article 2 of Chapter 131E for the purposes stated in that Part" for "Article 12 of Chapter 131 for the purposes stated in that Article" and substituted "G.S. 131E-24(c)" for "G.S. 131-112" in subdivision (c)(3), and substituted "Chapter 162A" for "Chapter 162" in subdivision (c)(10).

The 1985 amendment by c. 696, s. 2, effective July 11, 1985, added the language beginning "Land condemned for any liquid pipelines" at the end of subdivision (a)(1).

Session Laws 1987, c. 2, s. 1, effective February 19, 1987, added subdivision (c)(12).

Session Laws 1987, c. 564, s. 13, effective July 6, 1987, substituted "community college" for "community college or technical college or technical institute" in subdivision (c)(11).

Session Laws 1987, c. 783, s. 6, effective August 12, 1987, inserted "or sewer and septic tank lines and systems" at the end of subdivision (b)(4).

Session Laws 1989, c. 706, s. 3, effective October 1, 1989, in subdivision (b)(8) inserted "designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989", and inserted "effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate."

Session Laws 1989, c. 740, s. 1.1, effective August 8, 1989, added subdivision (c)(13).

CASE NOTES

I. General Consideration.
II. Public Use.
III. Private Condemnors.
  A. In General.
IV. Public Condemnors.
VI. Judicial Review.

I. GENERAL CONSIDERATION.

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Subdivision ordinance as applied by defendant constituted an exaction requiring the court to determine whether the exaction amounted to an unconstitutional taking; therefore, summary judgment for defendant was inappropriate as to that issue. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Applied in City of Burlington v. Isley Place Condominium Ass'n, 105 N.C. App. 713, 414 S.E.2d 385 (1992).

Cited in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Pinehurst v. Regional Invs., 97 N.C. App. 114, 387 S.E.2d 222 (1990).

II. PUBLIC USE.

Meaning of "Public Use". — The statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. Rather, because of the progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with the changing times. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Test of Public Use or Benefit. — On judicial determination of whether a condemnor's intended use is an action for "the public use or benefit" under this section, courts in this and other states have employed essentially two approaches to this problem. The first approach — the public use test — asks whether the public has a right to a definite use of the condemned property. The second approach — the public benefit test — asks whether some benefit accrues to the public as a result of the desired condemnation. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Question of Law. — While the delegation of the power of eminent domain is for the legislature, the determination of whether a condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

A taking can be for public use or benefit even when there is also a substantial private use, so long as the private use in question is incidental to the paramount public use. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

The provision of telephone service, irrespective of the number of customers affected, is an action for "the public use or benefit." Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one individual's manufacturing plant involved a private use, despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

IV. PUBLIC CONDEMNORS.

Public Recreational Facility Need Not Be Designed Before Land Is Acquired. — Neither subdivision (b)(3) of this section, which vests municipalities with the power of eminent domain to establish, enlarge or improve parks, playgrounds and other recreational facilities, nor § 160A-353, of similar import, nor any other statute contains any requirement that the city design a public facility authorized by resolution before the land for the facility is acquired. City of Charlotte v. Rousso, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Local Zoning Laws. — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in subdivision (b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws, by virtue of the fact that through §§ 153A-347 and 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

Municipal Airports. — The provisions of this Chapter now control cities' eminent domain actions with respect to airports. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

It was not error to find that plaintiff was authorized to acquire land for parks, recreational programs and facilities through exercise of power of eminent domain. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

VI. JUDICIAL REVIEW.

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989), citing Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989), rev'd on other grounds, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

§ 40A-5. Condemnation of property owned by other condemnors.

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 1; 1993 (Reg. Sess., 1994), c. 700, s. 1.

§ 40A-8. Costs.

CASE NOTES

Award of Attorneys' Fees in Inverse Condemnation Proceeding. — It is consistent with this section to award attorneys' fees when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking. City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989), cert. denied, 326 N.C. 363, 389 S.E.2d 816 (1990).

Plaintiff Could Not Proceed in One Action with Petition for Certiorari and Complaint for Costs, Damages, etc. — Plaintiff's petition for writ of certiorari to review town's decision denying plaintiff's subdivision permit application was improperly joined with her complaint against the town in which she alleged constitutional violations and sought damages, costs, and attorneys' fees pursuant to this section. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under this section was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Cited in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989).

§ 40A-10. Sale or other disposition of land condemned.

Local Modification. — Cabarrus: 1991, c. 685, s. 8; Cabarrus County and any incorporated municipality partly or wholly in Cabarrus County: 1985, c. 269.

§ 40A-12. Additional rules.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

ARTICLE 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

§ 40A-22. Service.

CASE NOTES

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

CASE NOTES

II. Exceptions and Appeals.

II. EXCEPTIONS AND APPEALS.

Filing Exceptions to Commissioner's Report as Prerequisite to Filing of Appeal. — The respondents failed to make any exceptions to the Commissioner's report. They also failed to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed. Carolina Power & Light Co. v. Crowder, 89 N.C. App. 578, 366 S.E.2d 499 (1988).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

Local Modification. — City of Durham: 1993, c. 476, s. 1.

Cross References. — As to requirement for consent of the board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

CASE NOTES

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

§ 40A-41. Institution of action and deposit.

Local Modification. — Cabarrus: 1985, c. 194, s. 2. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Stated in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

(a) When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10) or (12), title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or
(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or
(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor. (1981, c. 919, s. 1; 1989 (Reg. Sess., 1990), c. 871, s. 1.)

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 2; 1993 (Reg. Sess., 1994), c. 700, s. 1; Duplin: 1993 (Reg. Sess., 1994), c. 608, s. 1; Franklin: 1989, c. 432, s. 1; Guilford: 1987, c. 669, s. 4; Person: 1983, c. 829; Wake: 1985, c. 640, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 4; town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; town of Wrightsville Beach: 1993, c. 187, s. 2. For additional local modifications to this section, see the main pamphlet.

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 9, 1990, inserted "or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10) or (12)" in the first sentence of subsection (a).

CASE NOTES

Subsection (a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under § 40A-45 landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Title of Defendants Holding Property as Tenants by Entirety Need Not Be Divested Simultaneously in Condemnation Proceeding. — Where plaintiff acquired title to defendants' interest in certain property owned by them as tenants by the entirety, and even though plaintiff argued such title on separate dates, this Chapter contains no requirement that title to condemned property be divested simultaneously. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Effect of Answer Which Did Not Contest Plaintiff's Power to Condemn. — Where, in condemnation proceeding original answer of defendant property owner contested only amount of compensation due and did not contest power of plaintiff to condemn property, title to defendant's interest vested in plaintiff at that time, and plaintiff's filing of amended complaint did not void defendant's original answer. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Cited in UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 432 S.E.2d 699 (1993).

§ 40A-45. Answer, reply and plat.

CASE NOTES

Section 40A-42(a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under this section landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Property Owners Not Entitled to Injunctive Relief. — As subdivision (a)(3) of this section gave owners an opportunity to raise in court the issue of pending voluntary annexation proceeding, they had an adequate remedy at law and were not entitled to injunctive relief granted by the trial court, enjoining county from proceeding with condemnation proceeding. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

§ 40A-46. Time for filing answer; failure to answer.

CASE NOTES

Applied in Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

§ 40A-47. Determination of issues other than damages.

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-48. Appointment of commissioners.

CASE NOTES

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

What Constitutes a "Project" under this Section. — Although defendant designated the entire widening of the road as a "project," where there was evidence that individual sections were also referred to as "projects," because the road was widened in sections by different contractors, and there were beginning and ending points to the widening of each section, these individual sections met the definition of "projects" for purposes of subsection (a). McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Where plaintiffs sued for inverse condemnation by city whose road widening project was composed of many separate projects performed by more than one contractor, the plaintiffs had 24 months from the completion of the individual section of road encroaching upon their property which for purposes of subsection (a) was the "project" involving the taking. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Applicability of Subsection (c). — Although subsection (c) provides that "nothing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," it was not relevant in an inverse condemnation case, since an owner has no common-law right to bring a trespass action against a city. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common-law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse condemnation action involving a taking occurring as a result of the construction and operation of an airport runway. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run, etc. — The individual section of widened roadway, which constituted the taking by inverse condemnation of plaintiff's property, was not completed until the maintenance period was completed; the statutory period runs from the completion of the "project," which does not necessarily mean it runs from the completion of construction. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Migration of Cases from City Landfill. — Because this section, the inverse condemnation provision, provides a landowner's only remedy for alleged damage in the nature of a "taking," the court granted summary judgment as to multi-family apartment complex developer's state, common-law claims for nuisance, trespass, and negligence based on migration of methane gases from city landfill. Ashley Park Charlotte Assoc. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Strict Liability Action Was Not Precluded. — Developer's strict liability claim based on migration of methane gases from city landfill based on the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 was not preempted by this section. Ashley Park Charlotte Assoc. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under § 40A-8 was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Applied in City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989); Naegele Outdoor Adv., Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994).

§ 40A-55. Payment of compensation.

CASE NOTES

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in In re Lee, 85 N.C. App. 302, 354 S.E.2d 759 (1987).

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

CASE NOTES

Real Property Valuations for Ad Valorem Purposes Admissible. — Evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county, in an eminent domain proceeding, as an admission of a party opponent. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-63. In general.

CASE NOTES

Valuation of Land as of Date of Taking. —

In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Price of Reconveyed Property. — Section 136-19, when read consistently with this section and § 40A-65, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Stated in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 40A-64. Compensation for taking.

CASE NOTES

Landowner's Son Competent to Give Opinion of Land Value. — The son of a landowner who had exhibited a great deal of familiarity with the property, as well as neighboring properties, and was familiar with the value of these properties was competent to give an opinion as to the land value. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986).

Evidence Sufficient for Jury Question. — Where defendant landowner's evidence consisted of the before and after values of the tract that sewer line easement affected, there was sufficient evidence to go to the jury. Guilford County v. Kane, 114 N.C. App. 243, 441 S.E.2d 556 (1994).

Measure of compensation to one who loses right to remove sand and gravel from the property of another, when that right has never been exercised and the sand and gravel remain in the ground untouched, is the fair market value of the sand and gravel in place. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Where petitioner which had the contractual right to remove sand and gravel from property which was condemned, failed to show by credible and convincing evidence the value of its interest in the condemned land, petitioner was entitled to nominal damages only. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-65. Effect of condemnation procedure on value.

CASE NOTES

Price of Reconveyed Property. — Section 136-19, when read consistently with § 40A-63 and this section, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Evidence of Highest and Best Use as If Not under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnee's expert witness as to the property's highest and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

ARTICLE 5.

Return of Condemned Property.

§ 40A-70. Return of condemned property.

Whenever a public condemnor listed in G.S. 40A-3(b) or (c) acquires real property by condemnation and thereafter determines that the property is not needed for the purpose for which it was condemned, and the public condemnor still owns the property, the public condemnor may reconvey the property to the original owner upon payment to the public condemnor of the full price paid to the owner when the property was taken by eminent domain, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property. Unless the public condemnor acquired the entire lot, block, or tract of land belonging to the original owner, the original owner must own the remainder of the original lot, block, or tract of land from which the property was acquired to purchase the property pursuant to this section. The public condemnor shall specify a date by which the property must be reconveyed and the payment made, which may not be less than 30 days after written notification to the original owner that the public condemnor has decided to offer the return of the property. (1991 (Reg. Sess., 1992), c. 980, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 980, s. 2 made this article effective upon ratification. The act was ratified July 20, 1992.

Chapter 41.

Estates.

Sec.
41-2. Survivorship in joint tenancy defined; proviso as to partnership.
41-2.2. Joint ownership of corporate stock and investment securities.
41-6.3. Rule in Shelley's case abolished.

§ 41-1. Fee tail converted into fee simple.

Legal Periodicals. — For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

I. General Consideration.
III. Application and Illustrative Cases.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

III. APPLICATION AND ILLUSTRATIVE CASES.

Child Adopted by Unmarried Daughter. — Where will provided for remainder interest to an unmarried daughter "to have and to hold the same to her and the heirs of her body," any child adopted by her would satisfy the conditions of the will and could inherit as a bodily heir. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, cert. denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Devise to testator's wife for her natural life and at her death to testator's daughter and "her bodily heirs" vested a life estate in the land to the wife, with an estate tail in remainder to the daughter, whose interest was converted under this section into a defeasible fee simple, and, even though the wife conveyed her present life estate interest to her daughter, the daughter's interest could only be defeated in the event that she died without having children. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, discretionary review denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

§ 41-2. Survivorship in joint tenancy defined; proviso as to partnership.

Except as otherwise provided herein, in all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. Nothing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship. Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant. A conveyance of any interest in real property by a party to himself and one or more other parties, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for a joint tenancy with right of survivorship. (1784, c. 204, s. 6; R.C., c. 43, s. 2; Code, s. 1326; Rev., s. 1579; C.S., s. 1735; 1945, c. 635; 1989 (Reg. Sess., 1990), c. 891, s. 1; 1991, c. 606, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Session Laws 1991, c. 606, which amended this section, in section 2 provides: "A conveyance of any interest in real property occurring between January 1, 1991, and the effective date of this act [October 1, 1991] by a party to himself and one or more other parties that expressly provides for a joint tenancy with a right of survivorship shall have created such an interest."

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, added the last sentence.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Survivorship Only Abolished as Incident of Joint Tenancy. —

Right of survivorship has been statutorily abolished where it follows as legal incident to an existing joint tenancy. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with requirements of § 41-2.1(a). In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Cited in McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Legal Periodicals. — For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

Listing Survivorship Accounts on 90-Day Inventory Held Not to Make Accounts Part of Estate for Purpose of Right to Dissent. — Where executrix listed one-half of funds in survivorship accounts on 90-day inventory to comply with subdivisions (b)(3) and (4) of this section, listing accounts for this purpose on 90-day inventory did not make funds a part of net estate for purposes of determining right to dissent under § 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Joint Bank Accounts with Survivorship Created Under Subsection (a) of This Section. — Because right of survivorship has been statutorily abolished where it follows as legal incident to existing joint tenancy, parties who wish to create right of survivorship applicable to joint bank accounts must comply with requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Account Established Under Subsection (a) Not Part of Net Estate. — Funds held by testator-spouse in joint tenancy with right of survivorship with third party established pursuant to subsection (a) of this section do not become part of testator-spouse's net estate for purposes of dissent statute. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Written agreement not signed by party asserting rights as a survivor is not sufficient to satisfy statutory requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Plain language of this section clearly requires that both parties sign a written agreement. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Where signature cards for savings and loan association accounts designated both parties "as joint tenants with right of survivorship" and instructed the savings and loan association "to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, ... to pay, without any liability for such payment, to any one or the survivor or survivors at any time," the withdrawal clause indicating that withdrawals were to be made only by the deceased party would be disregarded and the contractual terms allowing both parties the right to act in any manner regarding the account controlled. McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988), cert. denied, 324 N.C. 328, 377 S.E.2d 749 (1989).

Survivorship Account Not Created. — Where the materials of the parties showed without contradiction that though plaintiff and codepositor intended to establish a joint savings account with the right of survivorship, codepositor died before signing the agreement, the statutory terms for creating a survivorship account were not complied with, and plaintiff's action seeking the release of funds held in the savings account, titled in his name and that of the decedent, had no basis. Powell v. First Union Nat'l Bank, 98 N.C. App. 227, 390 S.E.2d 461 (1990).

Applied in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990); Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ 41-2.2. Joint ownership of corporate stock and investment securities.

(a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b)(1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-2, 105-11, and 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to inheritance taxes. (1967, c. 864, s. 1; 1969, c. 1115, s. 2; 1989 (Reg. Sess., 1990), c. 891, s. 2.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective January 1, 1991, substituted "any parties" for "a husband and wife" in subsection (a), and "party" for "spouse" throughout subsection (b).

Legal Periodicals. —

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

§ 41-2.5. Tenancy by the entirety in mobile homes.

CASE NOTES

Security interest in a mobile home which was moveable, tangible property, was governed by Article 9 of the U.C.C. subsection (a) of this section, which provides that when a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property, does not dictate a contrary result. Joyce v. Cloverbrook Homes, Inc., 81 N.C. App. 270, 344 S.E.2d 58, cert. denied, 317 N.C. 704, 347 S.E.2d 42 (1986).

§ 41-4. Limitations on failure of issue.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For note, "Rawls v. Early: A Refusal to Imply Conditions of Survivorship Upon Ascertained Contingent Remaindermen," see 68 N.C.L. Rev. 1343 (1990).

CASE NOTES

Editor's Note. — *The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

Purpose of Section. —

The purpose of this section is to sustain the contingent interest created by the testator and ensure that the interest will pass in possession when and if the contingency occurs, even if the occurrence is after the death of the testator. Therefore, when the contingency is fulfilled the limitation is deemed to take effect. Hollowell v. Hollowell, 107 N.C. App. 166, 420 S.E.2d 827, aff'd, 333 N.C. 706, 430 S.E.2d 235 (1993).

§ 41-5. Unborn infant may take by deed or writing.

Legal Periodicals. —

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

§ 41-6.1. Meaning of "next of kin."

Legal Periodicals. — For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

At the time of death of testatrix who died May 22, 1962, "next of kin" and, by implication, "nearest relatives" still retained their very narrow technical common-law meaning. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

§ 41-6.3. Rule in Shelley's case abolished.

The rule of property known as the rule in Shelley's case is abolished. (1987, c. 706, s. 1.)

Editor's Note. — Session Laws 1987, c. 706, s. 2 made this section effective October 1, 1987, and applicable to transfers of property that take effect on or after that date.

§ 41-7. Possession transferred to use in certain conveyances.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

§ 41-10. Titles quieted.

CASE NOTES

I. General Consideration.
III. Pleading and Practice.
  A. In General.
  C. Jurisdiction of Courts.

I. GENERAL CONSIDERATION.

This section is highly remedial. — This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title. Boyd v. Watts, 73 N.C. App. 566, 327 S.E.2d 46 (1985), rev'd in part, 316 N.C. 622, 342 S.E.2d 840 (1986).

Burden on Plaintiffs. — In an action to quiet title under this section plaintiffs bear the burden of proving valid title in themselves which may be accomplished by either (1) reliance on the Real Property Marketable Title Act, or (2) utilization of traditional methods of proving title. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

If title becomes involved in a processioning proceeding, etc. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under Chapter 38. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to this section. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

No statute of limitations runs against plaintiff bringing action for removal of a cloud upon title. Such an action is a continuing right, which exists as long as there is occasion for its exercise. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

But Theory of Relief May Determine Applicability of Limitations. — There is no express statute of limitations governing actions to quiet title under this section. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

When Quiet Title Actions Are Treated as Ejectment Actions. — Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action Held Not One for Ejectment. — Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment controlled by §§ 1-38 and 1-40; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

Cited in Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986); Ballance v. Dunn, 96 N.C. App. 286, 385 S.E.2d 522 (1989); Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994).

III. PLEADING AND PRACTICE.

A. In General.

Complaint Upheld. — Plaintiffs' complaint, which alleged that noncompliance with legal formalities voided two deeds, but did not allege fraud, despite failure to state specific facts underlying these allegations, nevertheless, under the liberal theory of notice pleading, was minimally sufficient to state a claim for relief under this section. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

C. Jurisdiction of Courts.

Removal of Action to Federal Court. — Action to quiet title to real property in which plaintiff, the record owner, alleged that defendant had placed an IRS tax lien on the property, and that defendant's IRS tax lien was acting as a cloud on plaintiff's title and preventing plaintiff from selling or alienating the property was properly removed to federal district court, as the essential focus of plaintiff's action was the validity, priority, and extinguishment of the IRS tax lien. Wilkinson v. United States, 724 F. Supp. 1200 (W.D.N.C. 1989).

§ 41-10.1. Trying title to land where State claims interest.

CASE NOTES

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

State Did Not Consent to Be Sued for Betterments. — Construing this section strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

"Claim of Title to Land" Cannot Be Broadened to Include Claim for Betterments. — Sovereign immunity is a common-law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in this section cannot be broadened to include a claim for betterments under § 1-340. The betterments statute does not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

§ 41-11. Sale, lease or mortgage in case of remainders.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

§ 41-12. Sales or mortgages of contingent remainders validated.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1994

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina